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IN THE

Supreme Court of the United States

ROSE ACRE FARMS, INC.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court resolve the prevailing confusion over what constitutes the proper denominator in the takings fraction under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978)?

2. Should the severity of a regulation's economic impact on a going business concern be measured by diminution in value or diminution in return?

3. Should this Court resolve the confusion among lower courts concerning whether the *purpose* of a government regulation is still a relevant consideration under the "character" prong of *Penn Central*, in light of this Court's repudiation of the "substantially advances a legitimate state interest" test in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005)?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Rose Acre Farms, Inc. has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

This case presents recurring and important issues in takings jurisprudence. Both state and federal courts are in substantial disarray over the legal standards governing regulatory takings challenges under this Court's watershed decision from a generation ago in *Penn Central*. The upshot is an appalling state of unpredictability for both government authorities and property owners confronting Fifth Amendment takings issues. This case presents an attractive vehicle for addressing this vital area of constitutional law.

Here, the federal government, through the United States Department of Agriculture ("USDA"), prohi-

bited Rose Acre Farms, a family-owned farming business, from selling nearly 700 million healthy eggs as table eggs for an extended two-year period. The result of this exercise of federal power was Rose Acre's forced sale of eggs below the cost of production and, as a result, a vast economic loss. The USDA's regulations were largely experimental, based not on sound science, but on the untested and unrebuttable presumption that even the slightest trace of the ubiquitous salmonella bacteria in an egg-producing hen or hen environment would translate into salmonella-contaminated eggs. The agency was profoundly wrong. The record in this case established (i) that the USDA's assumption of a connection between contaminated hens and contaminated eggs was seriously flawed and (ii) that no Rose Acre egg was ever shown to contain salmonella.

On two separate occasions, the United States Court of Federal Claims found the USDA's actions to constitute a taking of Rose Acre's property, requiring the payment of more than $5 million dollars in compensation and more than $2 million in fees and costs. And on two separate occasions, the United States Court of Appeals for the Federal Circuit reversed. In the process, the Federal Circuit reconfirmed the existence of deep confusion within the lower courts—including *that* court—about the meaning and application of this Court's *Penn Central* test, and reinforced existing conflicts on legal issues that warrant this Court's review. Indeed, during the most recent appellate oral argument in this case, Chief Judge Michel observed that lower courts struggle to decide the kinds of significant, recurring constitutional issues presented here because "the guidance from above is not always crystal clear in this Fifth Amendment taking area,

as I think probably many lawyers have observed before me." Oral Arg. 32:53-33:01, *available at* http://oralarguments.cafc.uscourts.gov [case number 2007-5169]. Chief Judge Michel's frustration is noteworthy, since he and his Federal Circuit colleagues hear virtually all takings cases (those in excess of $10,000) against the United States.

At issue in this case is whether a property owner is entitled to just compensation when the government destroys or severely restricts healthy and economically productive private property in an effort to protect the public health. The question here is not whether the government has the power to take such action. That power is undisputed. Rather, the issue is whether a private farming business *alone* must bear the cost of that action. The Court should grant the petition and clarify the contours of its *Penn Central* test—the cornerstone of its modern regulatory takings doctrine.

OPINIONS BELOW

The Federal Circuit's most recent decision is reported at 559 F.3d 1260 (Fed. Cir. 2009) and reprinted in the Appendix ("App.") at 1a-49a. The Court of Federal Claims decision is unreported and reprinted in the Appendix at 91a-119a. The Federal Circuit's initial decision is reported at 373 F.3d 1177 (Fed. Cir. 2004) and is reprinted in the Appendix at 50a-90a. The trial court's first decision is reported at 55 Fed. Cl. 643 (2003) and is reprinted in the Appendix at 120a-180a.

JURISDICTION

The Federal Circuit issued its most recent decision on March 12, 2009, and denied a timely petition for

rehearing *en banc* on May 20, 2009. Pet. App. 1a. The Chief Justice extended the time to file this petition to September 17, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation." The pertinent USDA regulations are published at 9 C.F.R. §§ 82.30-82.36 (1991) and reproduced in the Appendix at 181a-193a.

STATEMENT

A. Factual Background

1. General Background on the Egg Business

The egg business is highly competitive with razor-thin profit margins. The business consists of two principal markets: the table-egg market and the breaker-egg market. The table-egg market—through which whole eggs are sold directly to end users—is the more profitable for most egg producers. The breaker-egg market—through which eggs are sold in liquid form, often for use in secondary products such as cake mixes—is considerably less profitable and is usually reserved for lower-quality eggs not suitable for sale as table eggs. Pet. App. 98a, n.9. Table eggs typically command a considerably higher price than breaker eggs. *Id.* at 93a, n.2. At all times relevant to this case, an egg sold in the breaker market fetched a price lower than Rose Acre's average cost of producing the egg. *Id.* at 99a.

2. Rose Acre's Table-Egg Business

Rose Acre is a family-owned business in Indiana that specializes in the production of table eggs. The business began with a single farm in 1955. By 1990, Rose Acre was a highly integrated table-egg production business that operated eight farms in Indiana and Iowa with millions of hens producing billions of eggs per year. *Id.* at 3a. As of 1990, Rose Acre sold more than 97 percent of these eggs in the profitable table-egg market, and sent only eggs of inferior quality to the breaker market. *Id.* at 98a.

3. The USDA Regulations and Their Application to Rose Acre

The USDA promulgated its regulations in an effort to protect the public from *salmonella enteritidis* (SE)—a strain of bacteria that is ubiquitous and impossible to eradicate. *Id.* at 4a-5a, 143a. Individuals can be exposed to SE in several ways, but the most common is through the consumption of raw or undercooked foods of animal origin, such as meat, poultry, milk, or eggs. It is undisputed that eggs are a nutritious and economical food and a low-risk source of SE.[1] Also undisputed is that the proper handling of eggs—thorough cooking, for example—eliminates even the slight risk of SE contamination.

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[1] The low incidence of SE in shell eggs was confirmed by scientific information that the USDA obtained both during and after it applied the SE regulations to Rose Acre, beginning in October 1990. For example, USDA's SE Risk Assessment—a comprehensive analysis of the public-health effects of consuming SE-infected shell eggs and egg products—predicts that only one in 20,000 eggs will contain SE. By comparison, one in ten chicken breasts purchased at the supermarket today contains salmonella. And in 1995, one in five store-bought chicken breasts contained salmonella. *See* C.A. App. 282, 527, 540, 911.

Nonetheless, in response to an increase in illnesses resulting from SE exposure, the USDA published interim regulations designed to restrict the interstate sale of potentially contaminated eggs and to limit the interstate transportation of potentially contaminated poultry. *See id.* at 181a-193a. Final regulations were published on January 30, 1991. *See id.* The final regulations imposed restrictions only on individual hen houses, rather than *all* poultry from an individual farm; otherwise, they did not differ materially from the interim regime.

Acting pursuant to these regulations in late 1990 and early 1991, the USDA designated flocks at three Rose Acre farms (known as Cort Acres, White Acres, and Jen Acres) to be "study flocks" after eggs produced at these farms were believed to be "the probable source" of an SE outbreak. 9 C.F.R. § 82.32(a); Pet. App. 185a. Under the "study flock" designation, the USDA conducted environmental tests (of manure and the egg-transport machinery in the hen houses) at the three Rose Acre farms. Because the "study flock" designation did not trigger restrictions on the sale of eggs, Rose Acre continued to sell eggs in the table-egg market while the USDA conducted environmental tests and awaited lab results. Several weeks later, after one or more hens from the study flock tested SE-positive, the USDA designated these flocks as "test flocks," which imposed severe restrictions on egg sales. These restrictions prohibited Rose Acre from selling as table eggs any eggs produced in any hen house with a positive SE test. *Id.* at 94a-95a. During the period between the reported outbreaks and the eventual quarantine of its eggs, Rose Acre sold more than 200 million eggs as table eggs without a single reported incidence of SE illness attributed to its eggs.

Further testing by the USDA revealed that at least one hen in the designated "test flocks" was SE-positive, resulting in the entire flock at that house being designated as "infected" and then quarantined. To accomplish this testing, the USDA entered Rose Acre's hen houses, physically removed 6,741 hens, slaughtered them, and transported the carcasses to a laboratory for testing by an autopsy procedure. Out of the millions of hens in the restricted houses, only 147 hens tested positive for SE. And there is no evidence even those hens would lay SE-positive eggs. *Id.* at 143a.

The USDA's restrictions proved to be economically devastating to Rose Acre. The problem is that the breaker market—the next best commercial alternative permitted under the Regulations—is a vastly inferior market for a business that specializes in the production of table eggs. Rose Acre suffered a negative return on its investment when it sold its restricted eggs. During the restricted period, the price for a dozen eggs in the breaker market was between 8 and 13 cents *lower* than Rose Acre's cost of producing them. By contrast, the price in the table-egg market was approximately 4 cents *above* its production costs.[2]

The USDA's restrictions lasted for an extended period of two years, resulting in a total economic

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[2] The average cost for Rose Acre to produce a dozen eggs during the restricted period was 54.96 cents. Pet. App. 135a, 148a. Rose Acre received, however, only between 41.46 and 46.64 cents per dozen for eggs sold to the breaker market. The average price for table eggs during this period was 59 cents per dozen. *Id.* These prices—measured in the hundredths of a single penny—underscore the razor-thin profit margins in the egg market. *Id.*

impact to Rose Acre of more than $20 million. *Id.* at 160a-161a. Rose Acre's financial losses on the sale of restricted eggs alone exceeded $5 million. *Id.* at 112a, 163a-164a. According to Rose Acre's expert, and as the trial court found, the Regulations caused a diminution in profit of 219 percent on eggs at these farms during the period of restriction. *Id.* at 108a. This is "equivalent to losing 100% of profits over 3½ years." *Id.* Such a loss is "a very substantial impact, and hard to imagine, how a business can survive, especially . . . with thin profit margins as Rose Acre had." *Id.*

It was not until October 1992 that USDA released the last of Rose Acre's houses from the restrictions. *Id.* at 133a-134a. By that time, 70 of Rose Acre's hen houses—amounting to more than 5 million hens—had been restricted by the Regulations, and Rose Acre had been forced to divert almost 700 million eggs to the breaker-egg market. After USDA lifted its restrictions, Rose Acre immediately returned to selling over 97 percent of its eggs as table eggs. *Id.* at 98a-99a.

B. Procedural History

1. Initial Proceedings in the Court of Federal Claims

Rose Acre filed this takings action in the Court of Federal Claims in 1992. Rose Acre contends that the USDA effectuated a taking under the Fifth Amendment when it restricted the sale of healthy eggs to the breaker market, forcing Rose Acre to sell hundreds of millions of its healthy eggs below the cost of production. Extensive discovery followed, and the court held a bench trial in April and May 2002. After reviewing the evidence and applying this

Court's takings jurisprudence, Judge Futey awarded Rose Acre $6.1 million in compensation and $2.4 million in fees and costs.

Specifically, the trial court found that the USDA's prohibition on the sale of healthy eggs in economically viable markets effected a regulatory taking that required just compensation under the Fifth Amendment. In the process, Judge Futey determined that the financial impact of these actions on Rose Acre was severe, as demonstrated by the trial record, and by the testimony of USDA witnesses.

2. Initial Proceedings in the Federal Circuit

The Federal Circuit reversed and remanded. The court began by disagreeing with the trial court's regulatory takings analysis under *Penn Central*. According to the Federal Circuit, when assessing the economic impact of the USDA regulations, the relevant "denominator" in the takings fraction should have been Rose Acre's three farms *combined*—although the USDA applied the regulations only to *individual* hen houses and restricted the sale of *individual* eggs. *Id.* at 73a, 95a. This choice of denominator alone significantly deflated the relevant economic impact of the USDA regulations.

The court of appeals also disagreed with the methodology by which to analyze the underlying, largely uncontested economic data. The court rejected the Government's argument that diminution in value[3] was the only appropriate measure of the

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[3] Diminution in value (also known as diminution in revenue) compares the value of property *before* the taking with the value remaining *after* the taking.

regulations' economic impact on Rose Acre, and suggested that diminution in return[4] was the preferred metric:

> We reject the government's contention that a returns-based analysis is per se less suitable than one based on diminution in value in the present case. If anything, it appears that the latter [diminution in value] is less appropriate where, as here, the issue concerns the economic impact, albeit temporary, of government regulations on a going business concern.

Id. at 70a.

As a result, the Federal Circuit vacated the trial court's finding on economic impact and ordered the court to reconsider this factor. The court affirmed the trial court's conclusion that the reasonable investment-backed expectations factor favored Rose Acre, *id.* at 74a-75a; reversed the trial court's conclusion that the character of the regulatory action favored Rose Acre, *id.* at 75a-83a; and instructed the trial court to reweigh the three *Penn Central* factors on remand to determine whether a compensable taking had occurred, *id.* at 83a-85a, 89a-90a. This Court denied certiorari.[5]

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[4] Diminution in return (also referred to as diminution in profit) compares the expected return (or profit) of a firm *absent* a government-imposed restriction with the actual return the firm experienced *with* the restriction.

[5] In the first petition, the parties vigorously contested whether the interlocutory posture of this case made it a proper vehicle for certiorari in light of the Federal Circuit's remand for further proceedings. This time, the finality of the decision below leaves no doubt that the Questions Presented are squarely at issue here, given the court of appeals' outright reversal, without a

3. Retrial in the Court of Federal Claims

On remand, the trial court heard additional expert testimony relevant to the *Penn Central* factors. The court determined that legal and economic principles warranted use of the diminution-in-return approach for measuring economic impact, given the disruption of profits to Rose Acre, a going business concern. It also found that fundamental economic principles called for use of *total* costs—not hypothetically available incremental costs—in calculating diminution in return. And it found that the temporary (two-year) nature of the USDA restrictions was severe because the diminution in return was equivalent to losing *all* of Rose Acre's expected profits for more than three years.

As for the other *Penn Central* factors, based on law-of-the-case principles, the trial court felt bound to follow the Federal Circuit's determination that the character prong favored the Government, although Judge Futey believed this Court's intervening decision in *Lingle* had actually vindicated his initial determination of the character factor for Rose Acre. And the trial court had no reason to reconsider Rose Acre's reasonable investment-backed expectations. The court then weighed the three *Penn Central* factors and again held that Rose Acre had suffered a taking. Judge Futey awarded Rose Acre $5.4 million as just compensation, plus $3.2 million in fees and costs.

4. Second Appeal to Federal Circuit

The Federal Circuit again reversed. Reflecting apparent confusion within that court, the panel this

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remand, of the trial court's second determination that Rose Acre suffered a taking of its property. Pet. App. 48a-49a.

time concluded that economic impact should be measured using *diminution in value* after all, despite the Federal Circuit's own prior suggestion that *diminution in return* was the preferred metric for a going business concern like Rose Acre—a statement that the Federal Circuit now described as "unfortunate dicta." *Id.* at 22a. According to the Federal Circuit, one problem with diminution in return that the trial court failed to address is that "the vast majority of takings jurisprudence examines, under *Penn Central*'s economic impact prong, not lost profits but the lost value of the taken property," *id.* at 16a, citing an academic article and several cases from this Court and lower courts for its conclusion—all of which *predate* the Federal Circuit's initial *Rose Acre* decision in 2004. *Id.* at 16a-17a (citing authorities).

In addition, the Federal Circuit again embraced its previous definition of the relevant parcel as Rose Acre's "three farms as a whole rather than each individual hen house." *Id.* at 15a. Based on the 10.6 percent diminution in the *value* of Rose Acre's eggs, the Federal Circuit concluded that the trial court clearly erred in finding the economic impact of the Regulations to have been severe, thus ignoring the 219 percent diminution in Rose Acre's *return on its investment* in the eggs. Although the court of appeals allowed that Rose Acre's monetary loss was "not insignificant," it nevertheless held that this factor "does not strongly favor Rose Acre." *Id.* at 31a.

With respect to *Penn Central*'s "character of the government's action" factor, the Federal Circuit focused almost exclusively on what it thought were the strong public health and public policy justifications for the regulations. The court suggested that this Court's decision in *Lingle*, which rejected the

"substantially advances" formula, might have changed the landscape, as other courts have found, concerning whether public purpose was relevant in regulatory takings cases. But the Federal Circuit concluded that *Lingle* had left unchanged a court's ability to inquire into government purpose, especially the "consideration of the health and safety aspect of the regulations." *Id.* at 39a.

With that in mind, the court recounted its version of the history of food regulation, tracing back to ancient times. The court's bottom-line conclusion was that the Government's stated goal of protecting public health "weigh[ed] strongly against finding a taking" in this case. *Id.* at 43a. In so doing, the Federal Circuit all but ignored the trial court's finding that the character of the Government's action here weighed in favor of a taking because the burden of the regulations fell disproportionately hard on Rose Acre and similarly situated egg producers.

REASONS FOR GRANTING THE WRIT

After seventeen years of litigation, Rose Acre's claim for relief has been thwarted by a pair of Federal Circuit decisions that have proved deeply hostile to the property rights protected by the Fifth Amendment's Just Compensation Clause. The decisions are characterized by shifting legal standards and inconsistent application of the Constitution, with no compensation awarded for government action that severely restricted healthy and economically productive private property in an effort to protect public health. Although takings cases are necessarily fact intensive and involve *ad hoc* inquiries, there are time-honored rules of law that should be stable, reliable, and applied consistently. The current, confused

state of this Court's takings jurisprudence does not lend itself to a clear, consistent, and predictable application of these important legal principles.

This case squarely presents legal issues on important and recurring constitutional questions that have divided the lower courts. The first issue concerns the prevailing confusion over what constitutes the relevant "parcel as a whole" against which to measure the severity of a governmental restriction on the use of private property. The second issue relates to the proper metric—diminution in value or diminution in return—for measuring a regulation's economic impact on a going business concern like Rose Acre. Finally, the third issue relates to *Penn Central*'s elusive "character" prong and, specifically, whether this Court's decision in *Lingle* forecloses consideration of the *purpose* of governmental action as part of a regulatory takings analysis. This Court should grant the petition and clarify the prevailing uncertainty in this crucial area of constitutional law.

I. LOWER COURTS REMAIN FRACTURED OVER WHAT CONSTITUTES THE PROPER DENOMINATOR FOR MEASURING THE ECONOMIC IMPACT OF A GOVERNMENT REGULATION.

This case squarely presents "the difficult, persisting question of what is the proper denominator in the takings fraction." *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001). The proper "denominator" or "parcel" or "takings fraction," whatever the label, all refer to the total property against which the plaintiff's loss must be measured in assessing the severity of the economic impact of a governmental restriction—an inquiry that focuses not merely on what the prop-

erty owner has *lost*, but also considers what he has *retained*.

In *Palazzolo*, the Court acknowledged that since defining the denominator as the "parcel as a whole" in *Penn Central*, this Court and lower courts have struggled to define what precisely constitutes the "parcel as a whole." *Id.* Previously, the Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), admitted that this uncertainty in defining the denominator of the takings fraction "has produced inconsistent pronouncements by the Court," *id.* at 1016 n.7, to say nothing of the inconsistent rulings from lower courts. In both *Palazzolo* and *Lucas,* however, the Court declined to address the question because it was either unnecessary, *id.*, or had not been argued below, *see Palazzolo*, 533 U.S. at 631.

This case is an attractive vehicle for addressing this "denominator" issue. The issue is squarely presented and extensively analyzed in a pair of published appellate decisions below. And it is precisely this question on which lower courts have reached inconsistent results: what constitutes the "parcel as a whole" when the government destroys the economic value of private property as part of a scheme designed to regulate public health.[6]

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[6] This Court has addressed takings issues most frequently in the context of real property, but the personal property interests at issue here are equally protected by the Fifth Amendment. *See, e.g., Phillips v. Washington Legal Found.*, 524 U.S. 156, 167 (1998); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1004 (1984). The question of how to define the "whole parcel" does not vary significantly depending on whether the question turns on the land, the produce of the land, or intangible property with no reference to any physical space. *E.g., Ruckelshaus*, 467 U.S. at 1005 (applying *Penn Central* test to intellectual property); *Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2003)

A. Lower courts are divided over how to measure the takings fraction denominator.

The Court's lack of guidance on the denominator issue has led to a patchwork of conflicting approaches across jurisdictions and even sometimes within the same jurisdiction on this fundamental Fifth Amendment question. *See* John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535, 1545 (1994) ("Instead of employing a consistent methodology, however, the courts have used a variety of fact-specific and often inconsistent methods to define the relevant parcel."). *See also* Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U. HAW. L. REV. 353, 353 (2003) (noting "the many definitions of the 'relevant parcel'"). For the most part, courts have applied three different approaches for determining the denominator, and the choice among them often dictates whether the governmental action was a taking. The three competing schools can be summarized as follows.

1. Unity of Ownership School

Some courts define the "whole" parcel by looking to unity of ownership, measuring the "parcel as a whole" based on all contiguous property or all nearby property owned by the plaintiff. *See, e.g., K&K Constr., Inc. v. Dep't of Natural Res.*, 575 N.W.2d 531, 537 (Mich. 1998); *Deltona Corp. v. United States*, 657 F.2d 1184, 1192 (Ct. Cl. 1981); *Penn Central Transp. Co. v. City of New York*, 366 N.E.2d 1271, 1276-77

(applying *per se* rule for physical invasions of land to taking of money). It is noteworthy that the Government has not argued for a different denominator analysis for personal property and real property.

(N.Y. 1977), *aff'd on other grounds*, 438 U.S. 104 (1978). Courts often apply this approach as an unstated assumption without fully exploring its propriety or considering other options. *See, e.g., Bevan v. Brandon Twp.*, 475 N.W.2d 37, 42 (Mich. 1991); *Jones v. Zoning Hearing Bd. of Town of McCandless*, 578 A.2d 1369, 1371-72 (Pa. 1990). Under this unity-of-ownership approach, the takings question turns not on what the government has taken, but on the *other* assets the plaintiff happens to own. This is the approach used by the court of appeals in this case.

2. Reasonable Expectation School

Other courts define the "whole" parcel by considering the owner's reasonable expectations, as shaped by its property rights under state law. Courts applying this standard look to several factors, including the degree of contiguity, the dates of acquisition, the extent to which the owner has treated the parcel as a single unit, the extent to which the restricted lot benefits the unrestricted lot, the timing of transfers, the owner's reasonable investment-backed expectations, and the owner's plans for development. *See, e.g., Dist. Intown Prop. Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994); *Am. Sav. & Loan Ass'n v. Marin County*, 653 F.2d 364, 372 (9th Cir. 1981); *Ciampitti v. United States*, 22 Cl. Ct. 310, 318-19 (1991); *Machipongo Land & Coal Co. v. Pennsylvania*, 799 A.2d 751, 768-69 (Pa. 2002).

3. Government Conduct School

Other courts, finally, hold that the government regulation itself determines the relevant parcel. *See,*

e.g., Vulcan Materials Co. v. City of Tehuacana, 369 F.3d 882, 891 (5th Cir. 2004); *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 904 (Fed. Cir. 1986), *vacated on other grounds*, 18 F.3d 1560 (Fed. Cir. 1994); *Twain Harte Assocs., Ltd. v. Tuolumme County*, 265 Cal. Rptr. 737, 744-45 (Cal. Ct. App. 1990); *Dep't of Agriculture & Consumer Servs. v. Mid-Florida Growers, Inc.*, 521 So. 2d 101, 104 (Fla. 1988). Under this approach, the court looks at how the regulatory action defines the relevant parcel. Thus, the regulation may "creat[e] separate parcels for 'taking' purposes" if it targets or affects only a subset of the larger property under the plaintiff's control. *Twaine Harte*, 265 Cal. Rptr. at 744. The focus here is principally on what the government has done, rather than how much property the plaintiff happens to own, or the manner in which state laws otherwise regulate affected parcels.

The prevailing disagreement among the lower courts should not continue. Indeed, this disagreement persists not only *among* courts throughout the country, but also *within* the Federal Circuit—the one court charged with exclusive jurisdiction over appeals from takings cases brought against the United States. *See* 28 U.S.C. § 1295(a)(3) (Federal Circuit has exclusive jurisdiction over final decisions of United States Court of Federal Claims). *Compare Florida Rock*, 791 F.2d at 904 (using government-conduct approach to find taking of 98-acre tract of land, even though tract was only small portion of owner's 1,560-acre purchase), *with Loveladies Harbor*, 28 F.3d at 1181 (endorsing "flexible approach" that accounts both for how government's action affects property, and for some of property owner's actions and reasonable expectations), *and Rose Acre*, Pet. App. 73a (employing unity-of-ownership approach

in holding that relevant denominator consists of all eggs produced on the "three farms (combined)," although USDA regulations targeted only certain flocks and hen houses). *See also id.* at 23a (reaffirming that correct parcel is all 135 million dozen eggs produced on Rose Acre's three affected farms during period of restriction).

Although takings questions are "essentially ad hoc, factual inquiries," *Penn Central*, 438 U.S. at 124, the pressing issue here is the lingering and continued disagreement over the *legal framework* for analyzing such facts. To paraphrase Justice Brandeis, when it comes to property rights, it is more important that the law be settled than that it be settled one way or another. *See Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

B. This case is a strong vehicle for answering the lingering denominator question.

In the decision below, the Federal Circuit's choice of the legal theory underlying the denominator effectively disposed of the appeal. In the first trial, Judge Futey determined that Rose Acre suffered a compensable taking because the USDA's order prohibited Rose Acre from selling nearly 700 million healthy eggs in the table-egg market. In so doing, the trial court considered the relevant denominator to be *all the eggs within affected houses*, thereby essentially adopting the government-conduct approach. The Federal Circuit, however, disagreed with this conclusion and measured the denominator based on *all eggs produced on Rose Acre's three affected farms*.[7] Thus,

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[7] In the second appeal, the Federal Circuit reaffirmed its law-of-the-case determination that the whole "parcel" consists of the

the Federal Circuit chose the first of the competing denominator theories, thereby deflating the perceived economic impact of the USDA regulations. As this Court suggested in *Lucas*, this constituted "an extreme—and . . . unsupportable—view of the relevant calculus." 505 U.S. at 1016 n.7. Had the court employed either of the other denominator theories—either by looking at Rose Acre's reasonable expectations about its eggs or by looking at how the USDA order governed the use of eggs based on the hen house—the court would have rightly limited its purview to the affected eggs themselves.

The result of the Federal Circuit's decision is that the Fifth Amendment means something different depending on whether a business is large or small. Here, if Rose Acre had owned only the restricted houses, it would have established the taking of its property since the denominator in the takings fraction would have been essentially the same as the restricted property. But because Rose Acre owned greater holdings, with more hen houses, the denominator is misleadingly large, thus deflating the relevant economic impact and immunizing the *same government conduct* from constitutional redress. The constitutional test should not turn on the *other resources* of the affected property owner. The Federal Circuit's approach thus transforms the Takings Clause into a *de facto* "deep pockets" rule, while simultaneously insulating government regulation from meaningful scrutiny when it targets plaintiffs with more assets. This view is inconsistent with a fair construction of the Takings Clause, which protects private property owners, large and small,

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eggs produced on the three restricted farms, and not *all three farms as a business*. Pet. App. 23a.

from bearing public burdens that "in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The Court should grant certiorari to resolve the question of the appropriate denominator theory.

II. THE COURT ALSO SHOULD CLARIFY THE PROPER METRIC FOR ASSESSING ECONOMIC IMPACT FOR A GOING BUSINESS CONCERN.

There also exists an untenable division in the lower courts, including within the Federal Circuit, over the proper metric for measuring economic impact.

A. Lower courts are divided over whether to use diminution in value or diminution in return to calculate economic impact for a going business concern.

For over sixty years, the Court has accepted diminution in rate of return as an appropriate measure of economic impact in takings cases. Indeed, this Court in *Penn Central* rejected the takings claim there based in part on its conclusion that the plaintiff could obtain "a 'reasonable return' on its investment." 438 U.S. at 136. Similarly, in *Fed. Power Comm'n v. Hope Natural Gas*, 320 U.S. 591, 603 (1944), this Court recognized that utility regulations producing a confiscatory rate of return would themselves be takings—without even discussing whether diminution in value of the affected utility must be considered. In addition, in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304 (1987), this Court held that "the Just Compensation Clause of the Fifth Amendment requires that the government pay the

landowner for the value of *the use of the land during this period.*" *Id.* at 319 (emphasis added). *Cf. Kimball Laundry Co. v. United States*, 338 U.S. 1, 8 (1949) (finding that proper measure of compensation for government's temporary use of laundry facility was rental profits likely to have been earned, rather than difference between property's market value on date of taking and date of return); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 328 (1893) (holding that when taking of tangible property deprives owner of ability to earn profit from collecting tolls on railroad franchise, just compensation requires payment to cover loss in profits); *Cienega Gardens v. United States*, 331 F.3d 1319, 1343 (Fed. Cir. 2003) (finding that plaintiffs suffered a taking when they sustained a 96 percent diminution in their expected return).

However, recent decisions from the Federal Circuit, including the decision below in *Rose Acre*, have rejected this well-established method for assessing economic impact. For example, in its latest decision in *Cienega Gardens v. United States*, 503 F.3d 1266 (Fed. Cir. 2007), the Federal Circuit rejected the return-on-equity approach, finding instead that the regulations' economic impact must be assessed by the diminution in lifetime value of the property. *Id.* at 1280-82. The Federal Circuit continued its rejection of the return-on-equity method in the *Rose Acre* decision. Pet. App. 22a-31a.

B. This case is a strong vehicle for answering the lingering question of the proper economic metric.

The decision below in *Rose Acre* leaves the Federal Circuit itself divided over the proper yardstick for measuring economic impact. In 2004, the first *Rose*

Acre panel suggested that rate of return was the more appropriate measure for assessing the economic impact of a temporary application of a regulation to an ongoing business. *Id.* at 70a.

But in 2009, the Federal Circuit made an abrupt about-face, concluding in the decision below that "it is clear that assessing the severity of the economic impact in this case by looking only at the percentage decrease in profits does not provide a sufficiently accurate view." *Id.* at 16a. Instead, the court gave "primary weight . . . to the diminution in value," *id.* at 31a, because eggs are a "discrete asset, the market value of which is readily ascertainable." *Id.* at 30a.

Of course, eggs were just as much a "discrete asset" with a "readily ascertainable" market value in 2004 as in 2009. Thus, the costly and time-consuming remand for a second trial (and subsequent appeal) proved to be a pointless undertaking; the Federal Circuit's rejection of Rose Acre's takings claim in 2009 was premised on uncontroverted facts established in the *first trial* and well known to the first *Rose Acre* panel in 2004. Although the court's 2009 decision tried to distance itself from what it termed "unfortunate dicta" in its first decision regarding diminution in return, it left the holding in *Cienega Gardens* intact. This split over the proper metric for measuring economic impact is unlikely to be resolved unless this Court intervenes, in light of the Federal Circuit's denial of rehearing *en banc* on this very question.

The confused state of takings jurisprudence, including within the sole appellate court that hears takings claims against the Government, cries out for clarification and resolution by this Court. The Court should grant certiorari to resolve the question of the

proper metric for assessing economic impact for a going business concern like Rose Acre.

III. THIS COURT MUST CLARIFY THE CONFUSION AMONG LOWER COURTS REGARDING THE ONGOING RELEVANCE OF *PENN CENTRAL*'S "CHARACTER" PRONG AFTER *LINGLE*.

Finally, this Court's review is necessary to resolve the uncertainty among lower courts over the meaning of the "character" inquiry in light of *Lingle*. In *Lingle*, the Court explicitly rejected the idea that the "substantially advances a legitimate state interest" formula from its decision in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), could be a stand-alone test for regulatory takings. By rejecting the *Agins* formulation, *Lingle* called into question the ongoing role that the "character" factor from the *Penn Central* test should play. And not surprisingly, in *Lingle*'s aftermath, lower courts have grown increasingly divided over how to assess the character of governmental action challenged as a regulatory taking. In this case, despite *Lingle*'s strong statements regarding the impropriety of measuring the importance of the government's purpose in taking the property, the court of appeals not only considered but relied heavily on the government's public-health justifications.

A. Courts are divided over whether a regulation's purpose still forms a valid part of *Penn Central*'s "character" inquiry after *Lingle*.

In *Lingle*'s aftermath, lower courts have fractured over whether and to what extent the announced governmental purpose continues to factor into the

takings inquiry under *Penn Central*'s "character of government action" factor.

Some courts have renounced or rejected any consideration of governmental purpose in light of *Lingle*. For example, in *Buhmann v. Montana*, 201 P.3d 70, 92 (Mont. 2008), *petition for cert. filed sub nom. Wallace v. Montana*, 77 U.S.L.W. 3645 (U.S. May 11, 2009) (No. 08-1395), the Montana Supreme Court found that the trial court had erred in its character analysis because it had "inquired into the purposes and propriety" of the state law.[8]

Similarly, in *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 639 (Minn. 2007), the Minnesota Supreme Court, in light of *Lingle*, found that the character inquiry should no longer focus on the "merit" of the government action but on "whether the regulation is general in application or whether the burden of the regulation falls disproportionately on relatively few property owners." *See also Mann v. Ga. Dep't of Corr.*, 653 S.E.2d 740, 745 (Ga. 2007) ("[E]ven assuming, arguendo, that the substantiality of the public purpose advanced by a regulation [protecting children from recidivist sex offenders] is still pertinent to a takings challenge, *but see Lingle*, we cannot overlook the significant adverse economic impact of [the regulation] on appellant.").

Standing in sharp contrast to these cases are courts, like the court of appeals below, that continue to inquire into whether a challenged regulation advances a legitimate public purpose. For example, the Sixth Circuit in *Tennessee Scrap Recyclers Ass'n*

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[8] The petition filed in *Wallace*—which remains pending—raises issues similar to the *Lingle* question that Rose Acre is asserting here.

v. Bredesen, 556 F.3d 442 (6th Cir. 2009), as part of the character analysis, considered the importance of the regulation's purpose and held that character favored the government because "it was passed for a legitimate public purpose, the prevention of metal theft." *Id.* at 457. Similarly, in *Cienega Gardens*, the Federal Circuit defined the character prong as consisting of "the precise action that the government has taken and *the strength of the governmental interest* in taking that action." 503 F.3d at 1279 (emphasis added).

In *Small Property Owners of San Francisco v. City & County of San Francisco*, 47 Cal. Rptr. 3d 121, 136 (Cal. App. 2006), the court held that the proper focus of the character inquiry should be on "the *nature* rather than the merit of the governmental action." But in examining the nature of the governmental action, the court focused on whether the action served the "public good." And in *City of Gaylord v. Maple Manor Investments, LLC*, 2006 WL 2270494, at *7 (Mich. Ct. App. Aug. 8, 2006) (unpublished), the court, in analyzing the character prong, noted that it had "found that the City's regulations are a legitimate exercise of its police power."

Even the courts that have rejected consideration of governmental purpose as part of *Penn Central*'s character analysis have presented different views of what is relevant to that analysis. In Montana, the *Buhmann* court rejected the trial court's consideration of purpose but affirmed the court's determination that the character factor weighed against finding a taking. In so doing, the Montana Supreme Court relied on its character prong analysis from a companion case to *Buhmann* that involved the same state laws, *Kafka v. Montana Department of Fish, Wildlife*

and Parks, 201 P.3d 8 (Mont. 2009). In *Kafka*, the court determined that the character analysis inquires into the "magnitude or character" of the burden, which the *Kafka* court (and hence *Buhmann*) determined was minimal in that case. The *Kafka* court noted that the economic burden fell "squarely" on the shoulders of the plaintiff property owners but that the magnitude of the burden's intrusiveness was what was most important. *Id.* at 30-31. By contrast, the Minnesota Supreme Court in *Wensmann Realty*, relying on language in *Lingle* regarding burden allocation, determined that the key to the character analysis was whether the burden fell "disproportionately on relatively few property owners." 734 N.W.2d at 639. And finally, the *Mann* court in Georgia suggested strongly that the character prong is simply a dead-letter. 653 S.E.2d at 745.

This confusion in the lower courts concerning the proper interpretation of the character prong after *Lingle* is untenable. Among other things, it leads to disparate outcomes for similarly situated takings plaintiffs. Courts in jurisdictions that continue to consider the *purpose* for a regulation are far more likely to find that the character of governmental action favors the government, and thus unlikely to find a compensable taking. *Compare, e.g., Rose Acre*, Pet. App. 39a (finding no taking and invoking "the public health and safety aspect of the [USDA] regulations" in support of its conclusion that character prong "do[es] not favor Rose Acre") *with Wensmann Realty*, 734 N.W.2d at 640-42 (focusing on regulation's disproportionate application, and not on purpose behind it, in concluding that *Penn Central*'s character factor favored property owner).

And there is no reason to believe that the Federal Circuit, which handles all federal takings issues, will reexamine its approach without prodding from above. That court employed the same approach in 2007 in *Cienega Gardens*, 503 F.3d at 1279, and again in 2009 in *Rose Acre*, Pet. App. 42a-45a—both times treating the *purpose* of the governmental action as a central factor in upholding the regulations against a Takings Clause challenge. In addition, the court recently rejected Rose Acre's petition asking the *full* Federal Circuit to rehear this precise question: "Is the 'public-health' purpose of a regulation a valid takings consideration after *Lingle*?" Petition of Rose Acre Farms, Inc. for Rehearing *En Banc*, 2009 WL 1368236, at *1 (Apr. 27, 2009), *reh'g en banc denied*, (Fed. Cir. May 20, 2009).

Given the importance for both the Government and private property owners alike of having clear standards for adjudicating takings cases, it is appropriate for this Court to resolve the confusion now.

B. This Court's jurisprudence on the role of the "character" inquiry has been inconsistent.

The division in the lower courts over the proper focus of the character prong can be traced to incomplete, and sometimes contradictory, guidance from this Court regarding the role of the character inquiry. In *Penn Central* itself, this Court, discussing what the "character of the governmental action" captured, explained:

> A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, *see, e.g., United States v. Causby*, 328 U.S. 256 [ ] (1946),

> than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Penn Central, 438 U.S. at 124. Thus, from the beginning, the Court presented mixed signals regarding the "character" inquiry. The above explanatory statement first suggests a focus on the *effect* of the taking (*i.e.*, whether it is a "physical invasion"), but then moves on to the *purpose* or *reason* behind the government intervention (*i.e.*, whether it is a "public" program that serves the "common good").

Recently, however, the Court in *Lingle* called into question any inquiry into government motives or purposes as part of the takings analysis. *Lingle*, instead, suggested that the sole focus in a takings case ought to be on the actual impact that the regulation might have on the landowner. *Lingle* emphasized that the Takings Clause already "presupposes that the government has acted in pursuit of a valid public purpose." 544 U.S. at 543. Thus, the purpose or motives behind a particular regulation or taking is relevant only to the public use inquiry, but once that threshold requirement is met, it makes no sense to examine purpose again.[9]

In light of how *Penn Central* explained the "character" inquiry and given *Lingle*'s rejection of an analy-

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[9] As *Lingle* held, "the Takings Clause presupposes that the government has acted in pursuit of a valid purpose. The Clause expressly requires compensation where government takes private property '*for public use*.'" 544 U.S. at 543 (emphasis in original). *See also* John D. Echeverria, *Making Sense of* Penn Central, 39 ENVTL. L. RPTR. NEWS & ANALYSIS 10471, 10473 (2009) ("[I]t makes no logical sense to excuse the government from liability on the ground that the takings power is being used to accomplish an important public purpose.").

sis of the legitimacy or effectiveness of the government's actions in serving public ends, 544 U.S. at 542, a strong argument could be made that there is simply no room for the "character" analysis as set forth in *Penn Central*—physical invasions are already takings, no matter how minor, and government motives are subsumed by public use. *See* Dale A. Whitman, *Deconstructing* Lingle*: Implications for Takings Doctrine*, 40 J. MARSHALL L. REV. 573, 574 (2007). Yet the Court specifically "emphasize[d] that [its] holding [in *Lingle*] . . . does not require [it] to disturb any of [its] prior holdings." 544 U.S. at 545.[10]

Lingle's emphasis on impact could perhaps signal a new path for the "character" portion of the *Penn Central* test. *Lingle*'s concern for the actual effect of a regulation on the property owner is largely accounted for by the economic impact analysis itself from *Penn Central*. But *Lingle* also suggests that "information about how any regulatory burden is *distributed* among property owners" is also relevant to the analysis. *Id.* at 542. It may be that the proper approach weighs the regulation's impact on the property owner compared to others that may be similarly situated. *See Wensmann Realty*, 734 N.W.2d at 639-41. *Lingle* simply is not clear on this point, which is why this Court's review of this issue is necessary.

The Court's prior mixed messages on this subject have predictably generated confusion in the lower courts that only this Court can, and should, resolve by granting the petition here.

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[10] In *Lingle*, when describing *Penn Central*, the Court noted that economic impact and interference with investment-backed expectations are the "primary" factors. 544 U.S. at 538-39.

C. The Federal Circuit erred in considering the "public health" purpose of the USDA regulations as part of the character inquiry.

For its part, the Federal Circuit panel below initially stated that *Lingle* had altered the character analysis under *Penn Central*, and the court even suggested that post-*Lingle* "instead of looking at the rationality of the regulation, [courts] must consider 'the actual burden imposed on property rights, or how that burden is allocated.'" Pet. App. 37a (quoting *Lingle*, 544 U.S. at 543). But following a cursory dismissal of Rose Acre's evidence on how the burdens were actually distributed in this case, the court reveals its true analysis: "But, before deciding this factor, we need to consider the related issue of the public health and safety aspect of the SE regulations." Pet. App. 39a.

At that point, the court proceeded to consider the very *purpose* behind the governmental regulation in a way that *Lingle* had renounced, and concluded that the character prong "do[es] not favor Rose Acre" because of the public "health and safety aspect of the . . . regulations." *Id.* at 39a. Because *Lingle* itself "had nothing to do with the safety or health of the public," the panel thought that it had left "unchanged a substantial body of case law concerning the character prong." *Id.* *See also id.* at 44a ("[W]e do not believe *Lingle* caused any diminution in the importance of the *Penn Central* character prong, at least with respect to public health and safety regulations.").[11] In so doing, the panel ignored this

[11] The Federal Circuit's suggestion that a public-health purpose is a narrow exception to *Lingle* is belied by its recent decision in *Cienega Gardens*—another post-*Lingle* case having

Court's categorical language that the "substantially advances" test there had "no proper place in our takings jurisprudence," period—regardless of whether the regulations at issue involved health and safety. Indeed, the Court in *Lingle* presumed that most regulations that are going to be at issue in these cases will involve "adjustment of rights for the public good." 544 U.S. at 538 (quoting *Andrus v. Allard*, 444 U.S. 51, 65 (1979)).

The upshot of the court's discussion was that the purpose behind the government's regulation, protecting public health, weighed against finding a taking: "But the government did argue that the character of the government's act, protecting the public health by identifying diseased eggs and forcing their owner to remove them from the table market, weighs strongly against finding a taking here. We agree." Pet. App. 43a. Thus, the purpose behind the USDA's regulation was dispositive of the character inquiry.

This is precisely the kind of judicial examination into the motives and purposes behind the government's regulation that *Lingle* rejected. Indeed, had the government's purpose been as important as the panel held, Rose Acre should have been permitted to test the fit between the means that the government chose and the purposes behind the regulation. But that would have simply been a back-door way of reinvigorating *Agins*.

What Rose Acre argued below, based on what this Court said in *Lingle*, was that the character prong in

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nothing to do with public health—in which the court likewise said it is proper to consider the "strength of the governmental interest" as part of the character inquiry. 503 F.3d at 1279.

Penn Central ought to focus on the specific impact that the USDA's regulations here have on Rose Acre and how the burden of the regulations is allocated among the relevant parties. Only by concentrating on "the actual burden imposed on property rights, or how that burden is allocated" can courts identify "when justice might require that the burden be spread among taxpayers through the payment of just compensation." *Lingle*, 544 U.S. at 543. To the extent that the court of appeals even considered this argument, it rejected uncontroverted facts establishing the regulations' devastating impact on Rose Acre and their narrow application to egg producers alone—two factors that *Lingle* says are the centerpiece of the regulatory takings inquiry.

Particularly in light of *Lingle*, the Federal Circuit wrongly disregarded the trial court's factual findings that the regulatory burden for addressing the SE problem was not distributed widely, but narrowly and devastatingly, upon egg producers generally and Rose Acre specifically. Pet. App. 154a.

The Court should grant the petition to clarify the meaning of *Penn Central*'s "character" inquiry and the role, if any, of a regulation's *purpose* in establishing a taking.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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September 17, 2009

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
FEDERAL CIRCUIT

No. 2007-5169

ROSE ACRE FARMS, INC.,
Plaintiff-Appellee,

v.

UNITED STATES,
Defendant-Appellant.

March 12, 2009.
Rehearing En Banc Denied May 20, 2009.

Before MICHEL, *Chief Judge*, MOORE, *Circuit Judge*, and HUFF, *District Judge*.*

MICHEL, *Chief Judge*.

In 1992, Rose Acre Farms, Inc. ("Rose Acre") filed the present action in the United States Court of Federal Claims, claiming that United States Department of Agriculture ("USDA" or "the government") regulations that restricted egg sales from its farms and caused the loss of egg-laying chickens that tested positive for the presence of salmonella bacteria effected a taking requiring compensation under the Fifth Amendment. In 2003, the trial court held that

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* Honorable Marilyn Huff, District Judge, United States District Court for the Southern District of California, sitting by designation.

Rose Acre was entitled to compensation for a taking of the eggs affected by the regulations as well as for hens seized for testing. In our previous appeal, we held that the court misapplied the standards governing regulatory takings claims under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). We vacated and remanded for appropriate reconsideration.

We must again decide whether the trial court correctly held that the government's regulations, which restricted the sale of certain of Rose Acre's eggs during the approximately two-year period, constituted a taking for which just compensation is due. As explained below, we hold that, upon a proper assessment of the *Penn Central* factors, the USDA did not commit a compensable taking. We therefore *reverse* the judgment of the Court of Federal Claims.

BACKGROUND

To the extent the facts of the case aid our present analysis of the takings claim, we repeat those facts from our previous opinion. Further background and factual details are available in the trial court's opinion being reviewed here and the prior decisions related to the present case. *See Rose Acre Farms, Inc. v. United States*, No. 92-710C, 2007 WL 5177409 (Fed.Cl. July 11, 2007) ("*Rose Acre V*"); *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177 (Fed.Cir.2004) ("*Rose Acre IV*"); *Rose Acre Farms, Inc. v. United States*, 53 Fed.Cl. 504, 524 (2002), *superseded by* 55 Fed.Cl. 643 (2003) ("*Rose Acre III*"); *Rose Acre Farms, Inc. v. United States*, No. 92-710C (Fed.Cl. Aug. 7, 1995) ("*Rose Acre II*") (unpublished decision); *Rose Acre Farms, Inc. v. Madigan*, 956 F.2d 670 (7th Cir.1992) ("*Rose Acre I*").

I. Rose Acre's Operations

Rose Acre is a family-owned business based in Seymour, Indiana. It is primarily engaged in the production of table eggs, which are raw poultry eggs sold in their shells. Between 1955 and 1990, Rose Acre grew from a single layer-hen farm with 1,800 hens to a highly integrated table-egg production business consisting of eight layer-hen farms with millions of hens. Three of Rose Acre's Indiana farms are at issue in this case, namely, Cort Acres (in Cortland), White Acres (in White County), and Jen Acres (in Jennings County).

The production units on each farm are individual layer houses having varying capacities. In 1990, Cort Acres had thirty-six layer houses, each of which contained approximately 70,000 hens, White Acres had twelve layer houses, each containing approximately 125,000 hens, and Jen Acres had twenty-two houses, twenty-one of which were in production with capacities ranging from 67,320 to 112,000 hens.

The details of Rose Acre's vertically integrated production system are set forth in the trial court's earlier opinion. *See Rose Acre III*, 55 Fed.Cl. at 647. We note here, though, that all of the layer hens in a given layer house at any one time are, as a result of Rose Acre's production system, approximately the same age. Once young hens capable of laying eggs are placed in a layer house, production in that house normally continues uninterrupted for a period of about fifty-seven to sixty weeks, until the hens therein reach the end of their productive lives. When that cycle has ended, the hens are removed and destroyed, and the house is cleaned before new hens are introduced.

To maximize its production and provide a consistent supply of table eggs to the market, Rose Acre must carefully manage its layer house population and depopulation schedules. The trial court found that "[s]cheduling and timing . . . are key components of [Rose Acre's] business. An interruption in [Rose Acre's] scheduling system affects the entire organization, thus causing [Rose Acre] to be unable to supply eggs to its customers." *Id.*

II. USDA's Salmonella Regulations

A. The Interim Regulations

In the late 1980s, the Centers for Disease Control ("CDC") determined that the incidence and geographic spread of human illness resulting from exposure to Salmonella enteritidis serotype enteritidis ("SE") bacteria were increasing.[1] In response to the increase, the Animal Plant Health and Inspection Service ("APHIS"), a USDA division responsible for preventing the spread of communicable diseases, determined that emergency regulations were necessary to control the spread of SE in poultry flocks. On February 16, 1990, USDA published interim regula-

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[1] According to the trial court:

> Salmonella is a gram negative rod-shaped microscopic bacterium that is ubiquitous. There are more than 2,000 serotypes (strains) of salmonella, and it is most commonly found in the intestinal tract of animals and birds. Persons can be exposed to salmonella in many ways, but the most likely exposure is through the consumption of raw or undercooked foods of animal origin, such as meat, poultry, milk or eggs. When a person becomes sick from consuming salmonella, the condition is referred to as salmonellosis. Symptoms in humans include nausea, vomiting, abdominal cramps, diarrhea, fever and headache.

Rose Acre III, 55 Fed.Cl. at 648 n. 5.

tions that restricted the interstate sale and transportation of eggs and poultry from flocks determined under the regulations to be SE-contaminated. Poultry Affected by Salmonella Enteritidis, 55 Fed.Reg. 5576 (Feb. 16, 1990) (codified at 9 C.F.R. §§ 82.30-82.36 (1991)). The interim regulations were effective immediately upon publication, USDA having "determined that there is good cause for publishing this rule without prior opportunity for public comment," namely, the need for "[i]mmediate action . . . to prevent harm to the egg-type chicken industry and the public." *Id.* at 5580.

The interim regulations applied to "flocks," defined as "[a]ll the poultry on one premises," 9 C.F.R. § 82.30 (1991), and operated as follows. If "a Federal or State representative determine[d] through epidemiologic investigation that [a] flock [was] the probable source of disease in an outbreak of [SE-caused] disease in humans or poultry," USDA designated the flock as a "study flock." *Id.* § 82.32. A study flock was subsequently designated a "test flock" if either (1) "one or more" environmental test samples, i.e., "manure samples and egg transport machinery samples . . . collected and tested in accordance with" procedures set forth in the interim regulations tested positive for SE, or (2) "the person in control of the flock" refused to allow or interfered with the collection of such samples. *Id.* § 82.32(b). At the time the interim regulations were published, USDA believed that evidence of SE in layer hens' environment meant that the hens were infected and would, therefore, be more likely to produce SE-contaminated eggs. *See* 55 Fed.Reg. at 5576 (describing the "vertical" (hen to egg) and "horizontal" (environment to hen) modes of SE transmission).

"Test flock" status triggered restrictions on the interstate movement of eggs. Specifically, eggs from a test flock could be moved interstate only for uses requiring pasteurization,[2] and then only if the shipper obtained a permit and met other conditions. 9 C.F.R. § 82.33(a) (1991). Thus, the interim regulations prohibited the interstate shipment of test flock eggs for sale as table eggs.

Specified numbers of the hens in test flocks were also required to undergo blood and internal-organ testing. *Id.* § 82.32(c). A test flock was designated an "infected flock" if the organs of one or more hens tested positive for SE. Id. Infected flocks were subject to the same interstate transportation restrictions as test flocks. *Id.* § 82.33(a). An infected flock retained its "infected" designation until either (1) the flock was retested in accordance with the regulations and no internal organ tested positive for SE or (2) the houses that contained the infected flock were depopulated, subjected to specified wet cleaning and disinfecting procedures, and repopulated with a new flock. *Id.* § 82.32(c).

B. The Final Regulations

After USDA reviewed comments received from interested parties following the publication of the interim regulations, it published final SE regulations on January 30, 1991. *Chickens Affected by Salmonella enteritidis*, 56 Fed.Reg. 3730 (Jan. 30, 1991) (codified at 9 C.F.R. §§ 82.30-82.38 (1992)). The final regulations incorporated all of the above require-

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[2] According to Rose Acre, such uses include incorporation into products such as cake mixes. The facilities that process and pasteurize eggs for these uses are known as "breaker plants" and the eggs they process are known as "breaker eggs."

ments but authorized the imposition of restrictions on individual layer houses as opposed to whole flocks. 9 C.F.R. § 82.33(a) (1992). A provision conditioning release from "infected" status on a successful post-cleaning inspection of a depopulated infected house by a federal or state official was added. *Id.* § 82.37. Additional testing and retesting requirements were imposed on all houses on the same premises as any infected house. *Id.* § 82.38.

APHIS administered these SE regulations until mid-1995. A total of thirty-eight flocks were restricted between 1990 and 1994, resulting in over 1.3 billion eggs being diverted from the United States table egg market to breaker plants.

III. Rose Acre Tracebacks

In 1990, after the interim regulations took effect, SE illness outbreaks were traced to each of Cort Acres, White Acres, and Jen Acres. As a result of testing carried out in accordance with the interim regulations, USDA first restricted the interstate transportation of eggs from these three farms on October 5, 1990, November 27, 1990, and January 15, 1991, respectively. In each case, Indiana officials similarly restricted the intrastate transportation of eggs (except for uses requiring pasteurization) shortly after receiving notice of the federal restrictions.

After "test flock" restrictions were imposed as a result of environmental testing at each affected Rose Acre farm, USDA conducted blood and organ testing as set forth in the regulations. For organ testing, USDA employees physically removed sixty hens (whose blood had tested positive) from each house, killed them, and transported their carcasses to a

USDA laboratory in Ames, Iowa. As described above, a single positive organ result in a given house resulted in an "infected house" designation. No additional transportation restrictions were imposed as a result of an "infected" designation; obtaining release from restricted status, however, became more difficult. At first, Rose Acre tried to obtain release through continued organ testing of the hens in infected houses. For the most part, however, Rose Acre had to depopulate, clean, and disinfect infected houses, and then have those houses pass USDA inspection. The trial court noted that, in some cases, houses were empty for long periods while awaiting inspection. *Rose Acre III*, 55 Fed.Cl. at 651. It also noted that USDA inspection officials did no more than visually examine the interior of depopulated houses (after cleaning) with the aid of flashlights. *Id.*

Rose Acre finally succeeded in obtaining release from the restrictions imposed on Cort Acres, White Acres, and Jen Acres on July 16, 1992, May 8, 1992, and October 30, 1992, respectively. Thus, for a period of twenty-five months, Rose Acre had to sell eggs as breaker eggs instead of table eggs from one or more of the three farms.

IV. Rose Acre's Legal Challenges

Shortly after its operations became subject to the federal and state restrictions, Rose Acre filed an action in the United States District Court for the Southern District of Indiana seeking a declaration that the interim regulations were invalid. In that action, Rose Acre contended that (1) the interim and final regulations deprived Rose Acre of due process, (2) the interim regulations were not promulgated in accordance with the Administrative Procedure Act, (3) both sets of regulations exceeded USDA's

statutory authority, (4) the final regulations could not be applied retroactively, (5) both sets of regulations unlawfully delegated authority to state officials, (6) the application of certain monitoring provisions was invalid, and (7) it was entitled to compensation for eggs diverted to breaker plants. *Rose Acre Farms, Inc. v. Madigan*, No. NA 90-175-C, 1991 U.S. Dist. LEXIS 8691, at *3-4 (S.D. Ind. June 5, 1991). Ultimately, the United States Court of Appeals for the Seventh Circuit held that the regulations were neither arbitrary nor capricious and were promulgated within the authority of the Secretary of Agriculture. *Rose Acre I*, 956 F.2d at 675-77. It further held that "[i]t is to the claims court that Rose Acre must go" to pursue any claim for compensation. *Id.* at 674.

Rose Acre filed the present action in the Court of Federal Claims on October 13, 1992, alleging an uncompensated taking of its eggs and hens and violations of 21 U.S.C. §§ 114a[3] and 134a[4] (2000). The trial

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[3] 21 U.S.C. § 114a has since been repealed. Pub.L. No. 107-171, tit. X, § 10418(a)(8) (May 13, 2002), 116 Stat. 508. It provided, in relevant part:

> The Secretary of Agriculture, either independently or in cooperation with States or political subdivisions thereof, farmers' associations and similar organizations, and individuals, is authorized to control and eradicate any communicable diseases of livestock or poultry . . . which in the opinion of the Secretary constitute an emergency and threaten the livestock industry of the country, including the payment of claims growing out of destruction of animals (including poultry), and of materials, affected by or exposed to any such disease, in accordance with such regulations as the Secretary may prescribe.

[4] 21 U.S.C. § 134a has since been repealed. Pub.L. No. 107-171, tit. X, § 10418(a)(17) (May 13, 2002), 116 Stat. 508. It

court granted the government's motion to dismiss Rose Acre's section 114a claim for failure to state a claim, *Rose Acre III*, 55 Fed.Cl. at 653, and held, after a two-week trial, that section 134a provides Rose Acre no relief beyond that available under the Fifth Amendment, *Id.* at 662. The trial court awarded Rose Acre compensation in the amount of $6,165,297.72 for what it concluded was a regulatory taking of eggs diverted to breaker plants and a categorical taking of the hens confiscated for internal-organ testing. *Id.* at 665. The court also awarded Rose Acre $2,414,744.81 in attorney fees and expenses. *Id.* at 670.

The government appealed, challenging the trial court's holding that the government actions at issue here constituted a regulatory taking and a categorical taking and the award of fees and expenses (as based on an erroneous judgment that takings occurred). In our prior decision, we (1) vacated the trial court's finding with respect to the economic impact prong and instructed the court to reassess this factor; (2) affirmed the trial court's conclusion with respect to Rose Acre's reasonable investment-backed expectations; (3) reversed the trial court's conclusion that the character of the regulatory action favored Rose Acre; and (4) instructed the trial court to reweigh the *Penn*

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authorized the seizure, quarantine, and disposal of livestock or poultry to guard against the introduction or dissemination of communicable disease and further provided, in relevant part:

> [T]he Secretary shall compensate the owner of any animal, carcass, product, or article destroyed pursuant to the provisions of this section . . . . Compensation paid any owner under this subsection shall not exceed the difference between any compensation received by such owner from a State or other source and such fair market value of the animal, carcass, product, or article.

Central factors to determine whether a compensable taking had occurred. *Rose Acre IV*, 373 F.3d at 1196.

On remand, the trial court conducted a two-day trial in late 2006, consisting mainly of expert testimony relevant to the *Penn Central* factors. *Rose Acre V*, 2007 WL 5177409, at *4. After considering the evidence, the trial court ruled that the severity of the economic impact favored Rose Acre because it suffered a diminution in profit of 219%. *Id.* at *7. Based on our earlier opinion, the trial court ruled that the character of governmental action favored the government despite Rose Acre's contention that an intervening Supreme Court decision necessitated the reassessment of this factor. *Id.* at *8. The court had no reason to reanalyze Rose Acre's reasonable investment-backed expectations. *Id.* In reweighing all three Penn Central factors, the trial court again held that Rose Acre suffered a taking and awarded Rose Acre about $5.4 million as just compensation, plus interest, attorney fees, expert fees, and expenses, for a total of about $8.7 million. *Id.* at *9, *13. The government timely appealed, and we have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

ANALYSIS

I. Standard of Review

"Whether a compensable taking has occurred is a question of law based on factual underpinnings." *Maritrans Inc. v. United States*, 342 F.3d 1344, 1350-51 (Fed.Cir.2003) (citing *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed.Cir.2001)). Our review of a final decision of the Court of Federal Claims after a trial entails a de novo review of legal conclusions and a review of factual findings for clear error. *Glendale Fed. Bank, FSB v. United States*, 239 F.3d 1374, 1379

(Fed.Cir.2001). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948); *see also Maritrans*, 342 F.3d at 1351.

II. Fifth Amendment Taking

The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V, cl. 4. The Takings Clause does not altogether proscribe the taking of property by the government. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). Rather, if the government takes property for a valid "public use," the government must pay the property owner "just compensation," thus barring the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Cent.*, 438 U.S. at 123, 98 S.Ct. 2646 (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)).

The common touchstone of regulatory takings precedent is "to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). The Supreme Court has noted that, outside the context of "two relatively narrow categories" of *per se* regulatory takings cases and outside "the special context of land-use exactions," a court conducts a factual inquiry based on the well-

known *Penn Central* factors to evaluate whether the government's regulation rose to the level of a taking. *Id.* at 538-39, 125 S.Ct. 2074; *see also Maritrans*, 342 F.3d at 1351. The fact-based inquiry of *Penn Central* considers (1) the economic impact of the action on the claimant, (2) the effects of the governmental action on the reasonable investment-backed expectations of the claimant, and (3) the character of the governmental action. *Penn Cent.*, 438 U.S. at 124, 98 S.Ct. 2646. *Penn Central* governs the facts of this case, and therefore we turn first to the economic impact of the SE regulations.

A. Economic Impact of the Regulations

The economic impact of the government's regulatory action is mainly a factual question. *Cf. City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999) ("[W]e hold that the issue whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question."). Therefore, with respect to this factor, we review the findings of the Court of Federal Claims for clear error. *Glendale Fed. Bank*, 239 F.3d at 1379.

In our prior opinion, we explained that the trial court's initial analysis was insufficient because it only (1) made certain limited factual findings, (2) noted the conclusory testimony of the government's witness, and (3) favorably compared Rose Acre's claim to the factual situation in *Yancey v. United States*, 915 F.2d 1534 (Fed.Cir.1990), where we held that a USDA-imposed quarantine had effected a compensable taking of healthy breeder turkeys. *Rose Acre IV*, 373 F.3d at 1185. At the same time, we noted several undisputed facts relating to the economic impact of the regulations on Rose Acre. *Id.*

at 1184-85. For example, we recognized that there was agreement with respect to the average price Rose Acre and other sellers received for table eggs during the restricted period and the average price Rose Acre received for breaker eggs during the restricted period. *Id.*

Thus, there was, and still is, little dispute about the underlying economic data to be used in assessing the economic impact. The main disagreement concerned the methodologies by which to analyze the data. Prior to our remand, the trial court had not sufficiently examined whether the economic impact on Rose Acre should be calculated by a diminution in value analysis or a diminution in return analysis. Then, the government had argued that diminution in return is *per se* less suitable, but we rejected that contention. *Id.* at 1188. Rather, we observed that "[w]e need not choose, however, between the two analytical modes." *Id.* at 1189.

Certain other narrow issues needed further development. One such issue when first appealed was the identity of the correct parcel of property to be used as the "denominator" in the economic impact calculation. At that time, Rose Acre argued that the court should consider only "the revenue derived from the sale of (breaker) eggs from the restricted houses, but determine its profit using its total cost, including the (allocated) fixed costs it incurs in producing eggs in all of the houses on all its farms." *Id.* (emphasis omitted). The government, on the other hand, argued that "the relevant denominator is the combined total egg sales from the three farms during the period of restriction, but that profit should be figured using only the marginal cost to Rose Acre of producing each individual egg in the restricted houses." *Id.* (empha-

sis omitted). For reasons we need not explicate here, the competing denominators affected the calculation in a way that favored each party. Thus, a proper assessment of costs seemed necessary in order to determine properly the economic impact prong. Moreover, it was necessary to consider as the relevant parcel the three farms as a whole rather than each individual hen house.

In short, we instructed that, "using the three farms (combined) as the relevant 'denominator,' the trial court must determine whether the economic impact in this case is best measured by the value decline (a 10.6% diminution) or profitability decrease (at most, a reduction from a 4.8% profit to a 6.3% loss) caused by the restrictions." *Rose Acre IV*, 373 F.3d at 1190.

On remand, the trial court heard testimony from the economics experts of both Rose Acre and the government. Rose Acre's expert, Dr. Richard Just, was of the opinion that diminution in value was not an appropriate metric to use in assessing the economic impact and only diminution in return can be used in this case. *Rose Acre V*, 2007 WL 5177409, at *5. As characterized by the trial court, the government's expert, Dr. Bradley Reiff, purportedly agreed that both methodologies could be used. *Id.* Since the trial court characterized both experts as accepting a diminution in return approach, the trial court adopted this methodology. *Id.* at *6. The trial court then proceeded to determine whether the diminution in return should be calculated by using average total cost, as urged by Rose Acre, or incremental costs, as purportedly urged by the government. *Id.* at *6-*7. After considering the experts' testimony, the trial court concluded that the use of average total cost was more consistent with our prior

decision and that the government's "method of determining the diminution in return [*i.e.*, using incremental costs] simply does not reflect reality." *Id.* at *7. The trial court then found that, using average total cost, "the diminution in return for the period of the regulations was 219.2%." *Id.*

Except for the cost basis of the eggs, the parties do not generally dispute the underlying financial data. For instance, during the restricted period, 42.6% of the 135 million dozen eggs produced on the three farms were diverted to and sold in the breaker market. This means, of course, that 57.4% of the eggs were sold, as usual, in the table market. With respect to the difference in market value of the diverted eggs, the average decrease in value of each dozen of eggs came to about 6.10 cents.

Yet, the same data appear to provide vastly differing depictions as to the severity of the economic damage incurred by Rose Acre, depending on whether one looks at lost profits or lost values. It is this divergence between input and output that is at issue here. Based on our review of the evidence in the record, it is clear that assessing the severity of the economic impact in this case by looking only at the percentage decrease in profits does not provide a sufficiently accurate view.

We believe the diminution in return metric suffers from at least two potential deficiencies which were not addressed by the trial court and which may suggest that such an analysis is not appropriate in all takings situations. First, the vast majority of takings jurisprudence examines, under *Penn Central*'s economic impact prong, not lost profits but the lost value of the taken property. *See, e.g.*, Thomas J. Miceli & Kathleen Segerson, *Compensation for Regu-*

latory Takings: An Economic Analysis with Applications 15 (1996) ("Most takings cases since Pennsylvania Coal have generally applied some form of Holmes's diminution of value standard."). When the Supreme Court has assessed the economic impact of a regulatory taking, it has talked almost exclusively in terms of lost value rather than lost profits. *See, e.g., Andrus v. Allard*, 444 U.S. 51, 65-66, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979) (approximately 100% diminution in value); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384, 47 S.Ct. 114, 71 L.Ed. 303 (1926) (75% diminution in value); *Hadacheck v. Sebastian*, 239 U.S. 394, 405, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (87.5% diminution in value). Our case law is in accord. *See, e.g., Maritrans*, 342 F.3d at 1358 (considering 13.1% diminution in value of tanker barges); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1178 (Fed.Cir.1994) (noting a 99% diminution in value). Additionally, other federal circuits and the state courts often take a similar approach. *See, e.g., Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 286 (4th Cir.1998); *Ortega Cabrera v. Municipality of Bayamon*, 562 F.2d 91, 100 (1st Cir.1977); *Cent. Motors Corp. v. City of Pepper Pike*, 73 Ohio St.3d 581, 653 N.E.2d 639, 644-45 (1995). Thus, when a court considers only a profits-based approach, this precedent provides limited guidance and constrains a factfinder's ability to provide a complete and fair assessment of the economic impact prong of *Penn Central*.

The trial court's analysis suffers as a result of limited guidance on the profits-based measure, as the court did not compare the 219% diminution in return to anything, such as some benchmark standard. Instead, the court simply viewed the number as

indicative of a severe economic impact. This examination is flawed because it does not set any baseline or standard to which to compare an inherently relative number. And, as Dr. Reiff explained, comparing diminution in return in one case to diminution in value in another case "doesn't mean much." The dearth of comparable diminution-in-return numbers in the case law may have been the root of the trial court's cursory analysis, but comparable numbers seem necessary to assess whether the lost profits represent a severe impact.

A second drawback with examining only the diminution in return parameter is the potential difficulty in comparing any given diminution in return calculation with another diminution in return calculation. Simply put, diminution in return is an inherently relative term, the magnitude of which is dependent on the magnitude of the starting profit margin. As the government's expert, Dr. Reiff, explained, the product of the diminution in return calculation depends on the magnitude of the initial profit margin. Also, unlike diminution in value, which ranges from 0% to 100%, diminution in return can range from 0% to an infinitely large number, depending on the initial profit margin. Dr. Reiff further explained how the diminution in return metric may be difficult to interpret when the initial profit margin is less than zero, *i.e.*, when the company is operating at a loss. The trial court's opinion addressed none of these concerns.

Our concern about sole reliance on diminution in return is illustrated by the following example, which follows directly from and simplifies an example given by Dr. Reiff. Consider a company that manufactures a widget for a total cost of $3. Without any govern-

mental regulation, the widget has a market value of $5, yielding a profit of $2. Under two different regulatory schemes (Regulations A and B), the market value of the widget decreases to differing extents. In the first instance, under Regulation A, the widget sells for $3; in the second, under B, the widget sells for $1. The resulting calculations for diminution in return (DIR) and diminution in value (DIV) are shown.

Regulation	Cost	Market Value	Profit	DIR	DIV
None	3.00	5.00	2.00	n/a	n/a
Regulation A	3.00	3.00	0	100%	40%
Regulation B	3.00	1.00	-2.00	200%	80%

Thus, under Regulation A, the property owner suffers a 100% diminution in return and a 40% diminution in value. Under Regulation B, the property owner incurs a 200% diminution in return and an 80% diminution in value. In absolute dollars, the property owner has lost either $2 or $4 on the sale of each widget, compared to pre-regulation market value. Now, consider the same widget having a much smaller initial profit margin and a smaller decrease in value due to the regulation:

Regulation	Cost	Market Value	Profit	DIR	DIV
None	3.00	3.20	.20	n/a	n/a
Regulation A	3.00	3.00	0	100%	6.25%
Regulation B	3.00	1.00	-.20	200%	12.5%

In this second case, the economic data yield the same diminution in return but a significantly smaller diminution in value. The smaller diminution in value makes apparent sense, as the property owner is only losing twenty or forty cents on each widget. A last

variation of the example illustrates the increased disparity between profit and value calculations when the initial profit margin is even smaller.

Market

Regulation	Cost	Value	Profit	DIR	DIV
None	3.00	3.02	.02	n/a	n/a
Regulation A	3.00	3.00	0	100%	0.67%
Regulation B	3.00	1.00	-.02	200%	1.32%

In each of the above three scenarios, the property owner suffers an arguably severe diminution in return, either earning zero profit or operating at a loss, but incurs vastly different diminutions in value. Under current precedent, we would be hard-pressed to hold that a compensable taking occurred when the diminution in value is less than a penny on the dollar. But if we were to consider only the 100% diminution in return for that same alleged taking, it could seem plausible to conclude differently.

Other variations of the above example yield similarly incongruent results. In the last scenario above, for example, if a regulation decreases the initial value of the widget from $3.02 to $1.81, the widget loses 40% of its value, but that equates to a diminution in profit of about 6,000%. Based on the trial court's analysis and the expert's testimony, we are uncertain how such a value could be used effectively in a takings analysis.

Legitimate questions exist with the diminution in return metric, yet the trial court's opinion does not address them. For instance, as Dr. Reiff explained, when the initial profit margin is negative-meaning that the company is operating at a loss during the relevant regulatory period-calculation of the diminution in profit becomes problematic. And basic

mathematical principles impede an analysis when the starting profit margin is zero, as the result of dividing a real number by zero is undefined. Even though the government's expert raised these issues in his expert report and testimony, the trial court's opinion does not address them.

Instead of acknowledging the testimony of the government's expert with respect to the deficiencies of the diminution in return analysis, the trial court appeared to rely only on a selected piece of his testimony, thus concluding that both experts accepted the diminution in return as the only suitable metric. *Rose Acre V*, 2007 WL 5177409, at *6. The trial court stated that the government "did not present any evidence on which method best demonstrates the effect of the regulations on plaintiff, but instead asserts that, by any metric, the impact was not severe enough for plaintiff's loss to be considered a taking." *Id.* at *5. According to the trial court's summary, Dr. Reiff "testified that 'both diminution in revenue and diminution in profit are appropriate measures that the Court could employ in this case.'" *Id.* at *5 n. 14.

Our review of the record, however, reveals a significantly different understanding of Dr. Reiff's testimony. When asked on direct examination whether he had a basis to favor one methodology over another, Dr. Reiff replied as follows:

> These are two measures that the Court should consider. The important point is that if one can't come up with a measure for incremental cost, then the diminution in revenue measure would be superior to the diminution in profit measure. The diminution in profit measure using average total cost is not useful, so if one didn't have

> incremental cost measure, then I would prefer the diminution in revenue measure. But given that there's—if we can estimate the incremental cost, then you could look at either one of them.

Thus, Dr. Reiff agreed that both metrics could be used but only if the profit calculation used incremental costs, as urged by the government. If average total cost were used—as the trial court did indeed use—then Dr. Reiff's opinion was different. In fact, Dr. Reiff opined that the diminution in profit metric using average total cost "is not useful." The trial court seems to have overlooked this testimony.

Dr. Reiff's expert report, which was admitted into evidence, is consistent with this testimony. In his report, Dr. Reiff opined that "[t]he appropriate measure of the percent diminution in profit should be based only on the incremental cost of the relevant parcel." He also stated in his report that "the diminution in revenue [*i.e.*, diminution in value] is superior to the diminution in profit measure for a number of reasons." The record therefore clearly demonstrates that, although Dr. Reiff agreed that diminution in return could be used, he limited his agreement to using that metric only when incremental costs, and not total costs, were the underlying cost basis.

We understand that, in our prior opinion, we suggested that the diminution in return might be the more appropriate metric. *See Rose Acre IV*, 373 F.3d at 1188-89. That language was clearly dicta, albeit unfortunate dicta. Our statement, however, stemmed from a framing of the issues less clear than presently before the court. Rose Acre's initial contentions regarding economic harm illustrate how the ambiguous definition of the parcel of allegedly taken property led to some imprecise and unnecessary

language in our first opinion. When first filed, Rose Acre's suit sought over $21 million in damages, excluding interest. Rose Acre III, 55 Fed.Cl. at 653. The damages stemmed from alleged wrongs far wider than currently under consideration:

> (1) restricted egg sales; (2) losses from layers taken for necropsy; (3) empty house losses from depopulation through inspection; (4) reduced production during restricted periods before required depopulation; (5) reduced production during unrestricted periods before required depopulation; (6) cleaning and disinfection costs; (7) purchase of table eggs to cover obligations; (8) storage costs for restricted eggs; (9) losses due to disruption of overall business; and (10) interest.

Id. Accordingly, the trial court's approach examined much more than the 135 million dozen egg parcel that is all that is now under examination. For instance, the trial court asserted that "[t]he effectiveness of safe-handling instructions" was a key point in reviewing the takings claims. *Id.* at 654. The trial court noted that egg producers such as Rose Acre incurred losses because they "expend additional capital during downtime for cleaning and disinfection." *Id.* at 658.

We think the proper framing of the issue requires us to refocus on the approximately 135 million dozen eggs produced at the three farms, and not the three farms as a business. Rose Acre itself argues that the relevant parcel of property is the eggs. Rose Acre Br. 37 ("It is the eggs produced on the three farms during the period of restriction, and not the farms themselves, that represent the 'parcel as a whole,' as the Government itself previously maintained."); *see also* Oral Arg. 30:27-32:00, *available at* http://

oralarguments.cafc.uscourts.gov/mp3/2007-5169 (Rose Acre's counsel agreeing that the relevant parcel is the "135 million dozen eggs that were produced on those three farms during the relevant period"). Furthermore, our remand instructions referred to at most a 6.3% loss. *Rose Acre IV*, 373 F.3d at 1190. This maximum limit for diminution in return necessarily defined the proper parcel as the eggs and not the business.

Despite our attempted clarification of the issues, much of the expert testimony developed during the remand trial continued to focus on alleged losses not associated with the correct parcel of property.[5] The report of Rose Acre's expert is dominated by discussion of alleged economic costs suffered by Rose Acre as a business rather than on the diminished value of the eggs. Specifically, in his expert report, Dr. Just considered "[r]educed [egg] production during unrestricted periods as aging flocks awaited USDA decisions about whether depopulation would be required and the extent of cleaning that would be required" and "[d]isinfection costs associated with USDA requirements beyond normal cleaning expense." His testimony during trial also emphasized the importance of looking at the business as a whole. Dr.

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[5] The confusion with respect to the parcel is best illustrated by the fact that (1) Rose Acre's expert opined at trial that the parcel is the business, not the eggs; (1) Rose Acre's counsel asserted at oral argument before us that the parcel is the eggs, not the business; (3) the government's expert opined at trial that the parcel is the eggs, not the business; and (4) the government's counsel asserted at oral argument before us that the parcel is the "egg production operation, not the eggs." We accept responsibility for some of this confusion, but that does not relieve us of our duty to apply the law based on the correct parcel of property.

Just opined that diminution in return was the proper methodology because "it was the destruction of profit that impacted Rose Acre as a business." *Rose Acre V*, 2007 WL 5177409, at *5. Dr. Just dismissed any usefulness in considering the diminution in value because "[w]hen you look at the impact on an ongoing business concern [like Rose Acre], it just doesn't make sense to look at only the value of an asset." *Id.* But much of the alleged economic harm to which Dr. Just referred is properly characterized as consequential damages, which are generally not compensable in a takings case. *See Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1581 (Fed.Cir.1990). At one point, Dr. Just asserted that, if the court considered "all of the losses," Rose Acre "lost 699 percent of profits over 19 months." He equated that number to being "equivalent to losing 100 percent of profits over 11 years. And that is a very substantial effect, and I don't see how most any business can survive that kind of impact." Such testimony clearly referred to economic losses beyond the relevant parcel and was inconsistent with our prior opinion, in which we held that the diminution in profit metric could be "at most, a reduction from a 4.8% profit to a 6.3% loss." *Rose Acre IV*, 373 F.3d at 1190. The government's expert, Dr. Reiff, criticized this testimony, explaining that Dr. Just's larger damages calculations "really relate to a loss in value to the farms, not a loss to the relevant parcel itself." We think these criticisms are valid, and the trial court should have considered them.

The importance of properly defining the parcel likely explains why Dr. Just's testimony generally misses the mark with respect to his choice of methodology. As noted above, the eggs produced in the three farms represent the proper parcel. Yet Dr.

Just's analysis was stuck on the business as an ongoing enterprise. On direct examination, Dr. Just explained his position as follows:

> Q: Okay. What is—in your opinion, what is the asset whose value that has been diminished under this analysis that we would be trying to understand here?
>
> A: I don't see the case as defined in terms of the value of an asset that was diminished. I think it was the profit from an ongoing business that was diminished.

Later, when called to rebut the testimony of the government's witness, Dr. Just continued with his message that the business as a whole was the parcel.

> Q: Let me move on. Dr. Just, if you were to apply the diminution in value approach, that's the other approach that was referenced by the Federal Circuit, how would you apply that approach to Rose Acre's three farms?
>
> A: Well, I see diminution in value as an approach that is appropriate for valuing an asset . . . . In this case you have a flow of profit, which I think calls for the diminution in profit approach. But if you were to try to use a diminution in value approach in this case, you might look at the value of the three farms the day before the restriction was placed and compare that to the value of those three farms when the restrictions were imposed.

In further explaining his answer, Dr. Just criticized Dr. Reiff's reliance on the value metric: "What Dr. Reiff has done is tried to use the value approach by using the eggs as an asset. The eggs are

not the asset in this case, and so that's why the return—or diminution in profit is the appropriate approach to use here." When we review this testimony in light of our holding that the correct parcel is the eggs, it obliterates Dr. Just's opinion that the diminution in return is the proper metric. Once the parcel is defined as the eggs—and we see no reason why the eggs are not an asset of the company—Dr. Just's statement that diminution in value is "an approach that is appropriate for valuing an asset" is further confirmation that we ought to rely on the value metric rather than the return metric.[6]

Dr. Just also testified that he was amazed how a company could keep going based on a diminution in profit of 219%. But that number by itself is actually misleading as to the economic effect on Rose Acre as an ongoing business concern. The 219% number reflects the lost profit of only three out of Rose Acre's total of nine farms. We disagreed with the trial court's *Rose Acre III* opinion because it did not "explicitly rest its conclusion that the impact was severe on any appraisal of the effect of the restrictions relative to Rose Acre's relevant unaffected property interests." *Rose Acre IV*, 373 F.3d at 1188. It seems that this analysis is again absent. Simply concluding that a 219% decrease in profits is severe is not particularly enlightening unless that number is put in the context of the business operation as a whole. The 219% decrease in profits tells us nothing about Rose Acre's profitability as a whole during the restricted period. If we could conclude anything, it is

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[6] Certain assets may be analyzed in terms of a stream of future revenue deriving from the assets, in which case diminution in return might be a useful metric, but the eggs here are not amenable to such an analysis.

perhaps through Rose Acre's own expert who confirms that Rose Acre was able to absorb the cost of complying with the regulations by relying on the profits generated from the other six farms. If the proper parcel were the business as an ongoing enterprise, then we would have to understand how the 219% diminution in return compared to the profits Rose Acre earned from the six unaffected farms.

Rose Acre also places much reliance on the intervening decision in *Cienega Gardens v. United States*, 503 F.3d 1266 (Fed.Cir.2007), *cert. dismissed*, __ U.S. __, 129 S.Ct. 17, 171 L.Ed.2d 921 (2008), but its reliance is misplaced due to the substantial factual differences between *Cienega Gardens* and the present dispute. *Cienega Gardens* involved a complex regulatory scheme intended to encourage investment in low-cost rental housing. *Id.* at 1270-74. The asserted property right was not in a tangible asset or even a piece of land but rather the contractual right to prepay certain mortgages without subjecting the property owner to new financial limitations on permissible rental rates. *Id.* at 1274. Overreliance on factually dissimilar situations, such as the one in *Cienega Gardens*, muddies a regulatory takings analysis because, as the Supreme Court has repeatedly cautioned, such an analysis inherently "is characterized by an 'essentially ad hoc, factual inquir[y]' designed to allow 'careful examination and weighing of all the relevant circumstances.'" *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002) (quoting *Penn Cent.*, 438 U.S. at 124, 98 S.Ct. 2646, and *Palazzolo v. Rhode Island*, 533 U.S. 606, 636, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001) (O'Connor, J., concurring)).

The factual differences between *Cienega Gardens* and the present case also lead us to the issue of the SE regulations' duration. We noted in our previous opinion that "the court should also consider the significance of the fact that the regulations restricted Rose Acre's operations temporarily—for a period of about two years." *Rose Acre IV*, 373 F.3d at 1195. The trial court acknowledged that the regulatory time period was "relatively brief," but it nonetheless concluded that the impact was severe. *Rose Acre V*, 2007 WL 5177409, at *7. Rose Acre's expert, Dr. Just, explained that, although the regulation was in effect for only twenty-five months, the lost value was equivalent to three-and-a-half years worth of profit. *Id.* Hearing Dr. Just's testimony that a "219.2% loss of profits is 'equivalent to losing 100 percent of profits over 3 1/2 years,'" the trial court concluded that the economic impact was severe and weighed heavily in favor of Rose Acre, despite the short regulatory duration. *Id.*

Defining the parcel of property as the eggs, however, clarifies the weight properly afforded the duration of the regulation. When the property allegedly taken is a discrete asset, such as a food commodity, the duration of the regulation becomes less important in the overall analysis. The totality of the economic loss, for purposes of a takings analysis, is generally captured by the diminution in value metric, when the "taken" property is food or another commodity. The timing of the regulation is generally more important in cases where, for various reasons, it is more difficult to calculate the financial devaluation. *See, e.g., Tahoe-Sierra*, 535 U.S. at 307-12, 122 S.Ct. 1465 (addressing a taking claim due to a delay in permitting); *First English Evangelical*, 482 U.S. at 307-10, 107 S.Ct. 2378 (temporary restriction on right to rebuild on land in a flood zone); *Appolo Fuels,*

Inc. v. United States, 381 F.3d 1338, 1351-52 (Fed.Cir.2004) (delay in issuing a permit for mining); *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1367-69 (Fed.Cir.2004) (permitting case). For these reasons, the duration of the temporary restrictions does not strongly favor Rose Acre's claim.

Because the parcel of property is now clearly defined as the diverted eggs themselves, we are convinced that it was clear error to place sole reliance on the diminution in return metric. The eggs are a discrete asset, the market value of which is readily ascertainable. Indeed, as mentioned above, the parties do not materially dispute the average market value of the eggs in the table market versus the breaker during the regulated period. These data provide a clear picture of the decrease in value of the eggs.[7]

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[7] This is not to say that, in other circumstances, a factfinder may never rely solely on diminution in return to assess the economic impact of the regulation. In this case, however, we need not decide whether the trial court should have looked only at diminution in value without consideration of diminution in return. Thus, we do not hold that it is never proper to consider diminution in return as one proper metric in assessing a takings claim even when the property subject to regulatory action is a discrete asset, such as some commodity. Certain circumstances not presented to us here may support a more balanced examination of multiple economic indicators. Other mathematical formulations or certain normalization algorithms could perhaps render moot our concerns stated above about the diminution in profit metric. Conversely, upon a more searching analysis of the analytical methods, a court might conclude that diminution in return is never appropriate when analyzing certain classes of non-categorical takings claims. None of this need we decide today. Therefore, we leave those issues for future cases.

Instead, when we consider all three offered metrics of economic impact, with the primary weight given to the diminution in value, we conclude the trial court clearly erred in determining that Rose Acre suffered a severe economic impact due to the SE regulations. Rose Acre points to no case in which a court has found a diminution in value of 10% as being severe or as favoring a taking. Additionally, the infirmities in the diminution in return metric, as discussed above, warrant against placing much, if any, weight on that calculation on the facts of this case. We hold therefore that, although the monetary loss to Rose Acre was not insignificant, it did not even approach the level of severe economic harm and thus does not strongly favor Rose Acre.

Finally, the government requests that we consider the off-setting economic benefits of the regulation, which, according to the government, the trial court ignored. In doing so, the government urges that "common sense" dictates some consideration of the beneficial effects which the SE regulations had on Rose Acre's business and the egg industry as a whole. Under certain circumstances, regulatory action may confer an economic benefit on a party subject to the regulation. *See Cienega Gardens*, 503 F.3d at 1283 ("The Supreme Court in *Penn Central* clearly held that offsetting benefits must be accounted for as part of the takings analysis itself." (citation omitted)). Here, the government points to no economic data in the record to support its assertion of offsetting benefits.

B. Reasonable Investment-Backed Expectations

In *Rose Acre IV*, we affirmed the trial court's ruling with respect to Rose Acre's reasonable investment-

backed expectations. We summarized the trial court's analysis as follows:

> The trial court noted that, although the poultry industry in general is highly regulated, government experts previously believed that salmonella could contaminate the interior of a shell egg only via a crack or break in the shell. [*Rose Acre III*, 55 Fed. Cl.] at 659 (citing a government expert's testimony regarding the 1970s-era belief held by the Food and Drug Administration and the CDC that shell eggs were not associated with foodborne diseases). Accordingly, prior to 1990, eggs were subject only to inspection and restriction for evidence of potential environmental contamination.

Rose Acre IV, 373 F.3d at 1191.

Disagreeing with the government's view, we concluded that "the SE regulations were more than an extension of comparable regulations to a new disease. They were grounded in new scientific understanding (*i.e.*, that salmonella could be transmitted from hen to egg) and were unprecedented in their reliance on environmental and hen testing." *Id.* Thus, we held that, "even accounting for the history of regulation in the poultry and egg industries, we cannot agree that the trial court erred in concluding that this factor favors Rose Acre." *Id.* On remand, the trial court had no reason to reevaluate this factor; it thus remains in Rose Acre's favor.

C. Character of the Government's Action

In *Rose Acre III*, the trial court found that the character of the government's regulations favored Rose Acre. The trial court "conclude[d] the SE regulations were misguided because they relied on ineffec-

tive testing methods." *Rose Acre III*, 55 Fed.Cl. at 660. The court also concluded that Rose Acre "shared a disproportionate amount of the burden of the SE regulations." *Id.*

In our prior decision, we reversed the trial court's conclusion with respect to the character of the government's action. *Rose Acre IV*, 373 F.3d at 1195. We held this conclusion to be erroneous because, in part, the trial court's "misgivings about the regulations are primarily based on its finding that a less-burdensome, alternative regulatory scheme—egg testing—was feasible." *Id.* at 1193. We explained, however, that "the issue is not whether a less restrictive alternative to the government action existed or was 'possible.' It is whether there is a nexus between the regulation and its underlying public purpose." *Id.* at 1194 (emphasis in original) (citing *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987)). We faulted Rose Acre because it neither argued nor showed "that the regulatory means were inconsistent with knowledge the government possessed at the time they were adopted or applied against Rose Acre." *Id.* at 1195.

Between the time we remanded the case and the time the trial court rendered its decision, the Supreme Court changed the takings landscape with its decision in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). In a unanimous retreat, the Supreme Court discarded the "substantially advances" test set forth in *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). *Lingle*, 544 U.S. at 540, 125 S.Ct. 2074. In doing so, the Court marked a clear distinction between substantive due process analysis and Fifth Amendment takings analysis. *Id.* Although the

Court had admittedly discussed and approved the "substantially advances" language over the intervening twenty-five years, the Court concluded that it had never held a compensable taking based on the *Agins* test. *Id.* at 546, 125 S.Ct. 2074. The Court thus reaffirmed the outcome in cases such as *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987), in which the "substantially advances" test was arguably applied. The holdings of such cases, read in light of the particular facts of each case, it ruled, remain viable precedent. *See Lingle*, 544 U.S. at 546, 125 S.Ct. 2074.

The government argues that *Lingle* in no way changes the analysis under *Penn Central*. We cannot agree. The opinion's language itself signals the change in the law. *E.g., Lingle*, 544 U.S. at 544, 125 S.Ct. 2074 ("[T]he 'substantially advances' formula is not only doctrinally untenable as a takings test—its application as such would also present serious practical difficulties." (emphasis in original)). To the extent that other circuits have had the chance to visit the issue, those courts recognize that *Lingle* alters the calculus. *See Spoklie v. Montana*, 411 F.3d 1051, 1058 (9th Cir.2005) ("[T]he Supreme Court has just disavowed the use of the 'substantially advances' test in takings claims . . . ."); *see also Adams v. Village of Wesley Chapel*, 259 Fed.Appx. 545, 549-50 (4th Cir.2007) (unpublished). In addition to its effect on the takings analysis itself, the Ninth Circuit has noted that "*Lingle* pulls the rug out from under our rationale for totally precluding substantive due process claims based on arbitrary or unreasonable conduct." *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 855 (9th Cir.2007); *see also A Helping Hand, LLC v. Baltimore County*, 515 F.3d 356, 369 n. 6 (4th Cir.2008) (observing that *Lingle* "explicitly

distinguished between takings and substantive due process claims" and thus substantive due process claims based on property restrictions are not supplanted by takings law).

State courts which have addressed *Lingle* have come to a similar conclusion. *See Vanek v. State Bd. of Fisheries*, 193 P.3d 283, 293 (Alaska 2008) (noting *Lingle*'s demarcation between takings and due process analyses); *Kafka v. Dept. of Fish, Wildlife & Parks*, 2008 MT 460, 348 Mont. 80, 201 P.3d 8 9-10 (Mont.2008) (noting the Supreme Court's "rejection of the 'substantially advances' formula"); *Scofield v. Dep't of Natural Res.*, 276 Neb. 215, 753 N.W.2d 345, 358-59 (Neb.2008) (appreciating *Lingle*'s clarification of takings law); *El Paso Prod. Co. v. Blanchard*, 269 S.W.3d 362, 370 (Ark.2007) (setting aside any consideration of the "substantially advances" test); *Biddle v. BAA Indianapolis, LLC*, 860 N.E.2d 570, 577 n. 17 (Ind.2007) ("To the extent our prior decisions have relied on the *Agins* formulation, they are overruled."); *Mansoldo v. State*, 187 N.J. 50, 898 A.2d 1018, 1024 (2006) (declaring that, in view of *Lingle*, "considerations of 'legitimate state interest[s]' have no bearing on whether the [state] regulation effected a taking"); *Gove v. Zoning Bd. of Appeals*, 444 Mass. 754, 831 N.E.2d 865, 870 (2005); *Wild Rice River Estates, Inc. v. City of Fargo*, 705 N.W.2d 850, 854 (N.D.2005) (noting the disavowal of the *Agins* test by *Lingle*); *Coast Range Conifers, LLC v. State Bd. of Forestry*, 339 Or. 136, 117 P.3d 990, 998-99 (2005); *Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76, 80 (2005) ("To the extent that some of our previous cases have applied *Agins* alone or both *Agins* and *Penn Central*, we overrule them.").

Commentators have likewise expressed their opinion that *Lingle* alters the takings landscape. *See, e.g.*, Robert G. Dreher, *Lingle's Legacy: Untangling Substantive Due Process From Takings Doctrine*, 30 Harv. Envtl. L.Rev. 371, 402 (2006) ("[*Lingle*] rejects any normative component to takings law based on considerations of the efficacy or wisdom of the government's actions."); D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of Lingle v. Chevron and the Separation of Takings and Substantive Due Process*, 69 Alb. L.Rev. 343, 349 (2005) ("[I]t is undeniable that by eliminating the substantially advance standard the Court took at least a modest step in clarifying its regulatory takings doctrine."); John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. Envtl. L. & Pol'y 171, 200 (2005) ("*Lingle*, of course, jettisons the substantially advances test as a free-standing test.").

Thus, we can confidently say that, under *Lingle*, the regulatory takings paradigm has changed. We can no longer ask whether the means chosen by government advance the ends or whether the regulation chosen is effective in curing the alleged ill. All those concerns, albeit relevant concerns in many cases dealing with governmental regulations, are now confined to a substantive due process inquiry. *See Equity Lifestyle Props., Inc. v. County of San Luis Obispo*, 548 F.3d 1184, 1194 n. 17 (9th Cir.2008) ("Due process violations cannot be remedied under the Takings Clause . . . ." (citing *Lingle*, 544 U.S. at 543, 125 S.Ct. 2074)). And, as we have noted previously, the Seventh Circuit has long ago adjudicated those due process claims of this case. *See Rose Acre I*, 956 F.2d at 672-74.

Because *Lingle* indeed altered the analytical framework, the trial court should have reassessed the character prong of *Penn Central*. *See Wopsock v. Natchees*, 454 F.3d 1327, 1333 (Fed.Cir.2006) ("It is well established . . . that law-of-the-case principles do not bar a court from departing from earlier rulings when there is 'an intervening change of controlling legal authority' . . . ." (quoting *Toro Co. v. White Consol. Indus.*, 383 F.3d 1326, 1336 (Fed.Cir.2004))). In our prior opinion, we clearly applied the *Agins* test when we were dealing with "the distinct issue of consideration of 'whether the regulation[s] appropriately advance[d] a substantial government interest.'" *Rose Acre IV*, 373 F.3d at 1195 n. 15 (quoting *Tahoe-Sierra*, 535 U.S. at 323, 122 S.Ct. 1465). That inquiry is now obsolete. Although the trial court was, in part, correct that "*Lingle* does not necessarily invalidate" the character determination from *Rose Acre IV*, the trial court also thought its character-prong analysis from *Rose Acre III* "was likely the correct approach under *Lingle*." *Rose Acre V*, 2007 WL 5177409, at *8. Given the significant change in the law effected by *Lingle* and because we still disagree with aspects of the approach set forth in *Rose Acre III*, we feel it necessary to explain our reasoning in further detail.

Turning to what *Lingle* requires us to do rather than what we cannot do, the Supreme Court instructed that, instead of looking at the rationality of the regulation, we must consider "the actual burden imposed on property rights, or how that burden is allocated." 544 U.S. at 543, 125 S.Ct. 2074. The Court likewise directed that "the *magnitude or character of the burden* a particular regulation imposes upon private property rights" is an important consideration, as the now-discarded "substantially advances" test reveals nothing about that burden.

Id. at 542, 125 S.Ct. 2074 (emphasis in original). The Court also criticized a means-end analysis because it does not "provide any information about how any regulatory burden is distributed among property owners." *Id.* (emphasis in original).

Applying these insights to our present case, the undisputed facts indicate that the SE regulations did not single out Rose Acre. Instead, the enacted rules broadly applied to almost any egg producer in the United States. Specifically, the rules affected "primary and multiplier breeding flocks used for the purpose of producing progeny for commercial egg production, and to egg production flocks used for the purpose of producing table eggs for sale or other distribution in interstate commerce." 55 Fed.Reg. at 5578. The regulations admittedly did not apply to all poultry flocks because USDA focused its efforts "on controlling the spread of SE in the segments of the poultry industry where the spread of SE is most prevalent, i.e., egg-type flocks." *Id.* Additionally, the rules affected only those farms, whether Rose Acre's or another company's, which tested positive for SE. *Id.* The SE regulations as enacted targeted no single egg producer unless SE-infected eggs were traced back to a particular farm and that farm tested positive. Only then did an egg producer experience the negative consequences of the SE regulations.

In Rose Acre's view, however, the SE regulations could, and perhaps should, have been drafted more broadly. Specifically, because the regulations did not cover food handlers and the egg-consuming public, according to Rose Acre, the regulations' burdens were distributed "narrowly, and devastatingly, upon a few egg producers like Rose Acre." Additionally, the company argues, Rose Acre, more so than any other

egg producer, disproportionately suffered the consequences of the regulation because Rose Acre's eggs could be traced back to its farms more easily than the eggs of most other egg producers. These contentions seem to approach or possibly step over the line drawn in the sand by *Lingle* because, in some respect, they challenge the effectiveness of the regulations, which *Lingle* says we cannot do in a takings analysis. Moreover, even if Rose Acre's contentions are proper considerations under *Lingle*, we do not think they are sufficiently persuasive.

Based on this assessment then, even under *Lingle*'s new approach, the character of the SE regulations in this case do not favor Rose Acre. But, before deciding this factor, we need to consider the related issue of the public health and safety aspect of the SE regulations. In our view, although *Lingle* alters one aspect of analyzing regulatory takings, it leaves unchanged a substantial body of case law concerning the character prong. The asserted taking in *Lingle* had nothing to do with the safety or health of the public. Rather, *Lingle* addressed a law intended to modify the distribution of wealth by "imposing certain restrictions on the ownership and leasing of service stations by oil companies." 544 U.S. at 533, 125 S.Ct. 2074. The state of Hawaii enacted the law "in response to concerns about the effects of market concentration on retail gasoline prices." *Id.* We think it is clear that *Lingle* neither addressed nor disturbed *Penn Central*'s consideration of the health and safety aspect of the regulations. *See Penn Cent.*, 438 U.S. at 125, 98 S.Ct. 2646. To put *Penn Central*, *Lingle*, and the present case in the proper context, it will be helpful to summarize briefly the history and underlying bases of food regulation by governments in a takings analysis.

For almost as long as food has been in commerce, some "regulation" of food has existed. Cato, Pliny the Elder, and Galen all described recommendations or warnings about the quality of prepared foods. *See* George M. Burditt, *The History of Food Law*, 50 Food & Drug L.J. 197, 197 (1995). *See generally* Peter Barton Hutt & Peter Barton Hutt II, *A History of Government Regulation of Adulteration and Misbranding of Food*, 39 Food Drug Cosmetic L.J. 2 (1984). After the Dark Ages, England's Parliament in 1266 codified food laws which "prohibited the sale of any 'corrupted wine' or any meat, fish, bread, or water that was 'not wholesome for Man's body' or that was kept so long 'that it loseth its natural wholesomeness.'" Peter Barton Hutt, *Government Regulation of the Integrity of the Food Supply, 4 Annual Rev. of Nutrition 1* (1984), reprinted in Peter Barton Hutt, Richard A. Merrill, & Lewis A. Grossman, Food and Drug Law 1-2 (3d ed.2007).

In the United States, common law generally governed early limitations on the right to sell certain foods. Violations of those limitations incurred both civil and criminal liability. "To be sure, it was a crime at common law knowingly to sell bad food . . . ." Lawrence M. Friedman, *A History of American Law* 461 (2d ed.1985). Early courts in the United States imposing civil liability on a person for selling tainted food did not necessarily base their rulings on legal theories common today. In *Van Bracklin v. Fonda*, 12 Johns. Cas. 468, 468 (N.Y.Sup.Ct.1815), the court affirmed a jury verdict for the plaintiff who, along with others, had eaten beef that was "bad and unwholesome." The ruling in *Van Bracklin* sounded in contract more than tort or nuisance law, but nonetheless confirms that the right to sell food has long been subject to certain strictures. As the law

developed, courts accepted findings of liability based on then-novel doctrines. "In the late 1800s, courts in many states began imposing negligence and strict warranty liability on commercial sellers of defective goods." *Restatement (Third) of Torts: Products Liability* § 1 cmt. a (1998). In some cases, food manufacturers were held liable for unwholesome food under a theory of negligence. *E.g., Jackson Coca-Cola Bottling Co. v. Chapman*, 106 Miss. 864, 64 So. 791, 791 (1914) (affirming a finding of liability when the plaintiff became ill after drinking from a cola bottle in which a "'wee, sleekit, cow'rin,' tim'rous beastie' [had] drowned" (*quoting* Robert Burns, To A Mouse)). In other instances, manufacturers of food were liable to a consumer under a theory of implied warranty of merchantability, for example, even though the manufacturer and consumer were not in privity of contract because the consumer had purchased the food from a retailer. *E.g., Ward v. Morehead City Sea Food Co.*, 171 N.C. 33, 87 S.E. 958, 958 (N.C.1916) ("The authorities are numerous that there is an implied warranty, that runs with the sale of food for human consumption, that it is fit for food and is not dangerous and deleterious."). Later courts perceived little difference between the two theories. *See Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N.W. 382, 392 (Iowa 1920) (allowing plaintiff to rely on either negligence or implied warranty of wholesomeness against manufacturer of beans). As commerce developed, states turned to statutory law to define the rights of property owners with respect to food products.

Although the courts effectively resolved individual disputes between private parties involving unfit food, systemic deficiencies in the nation's food supply persisted. In the latter half of the nineteenth century, some states tackled the problem by increasingly

enacting legislation which broadly regulated aspects of the growing food trade. During the same period, Congress considered numerous pieces of legislation that would authorize federal regulation of the food industry. Eventually, in 1906, Congress enacted the Meat Inspection Act[8] and the Pure Food and Drugs Act, the latter of which paved the way for the creation of the FDA and the more comprehensive Federal Food, Drug, and Cosmetic Act of 1938. Since that time, the public has come to expect that federal agencies will police the safety of the food products in interstate commerce.

There is little doubt that it is appropriate to consider the harm-preventing purpose of a regulation in the context of the character prong of a *Penn Central* analysis. *See Appolo Fuels*, 381 F.3d at 1351 (considering "government action designed to protect health and safety" within the character prong of *Penn Central*). Even long prior to *Penn Central*, the Supreme Court considered health and safety in

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[8] Earlier that same year, Upton Sinclair published his novel *The Jungle* (1906), which tells the dark story of Jurgis Rudkis, a young Lithuanian immigrant working in Chicago's meatpacking plants. Sinclair's description of both the working conditions and the meat processing itself inflamed the public's concern about the Chicago stockyards and food safety in general. At one point in the novel, Sinclair explained how men working in the slaughterhouses would sometimes fall into a vat of lard, and "they would be overlooked for days, till all but the bones of them had gone out to the world as Durham's Pure Leaf Lard!" *Id.* at 117. Whether that particular anecdote was true mattered not, as Sinclair's work spurred both President Theodore Roosevelt and Congress to take action on pending legislation. *See, e.g., Meat Inspection Bill Passes The Senate, N.Y. Times*, May 26, 1906, at 1 (reporting how the Senate's passage of the bill was "the direct consequence of the disclosures made in Upton Sinclair's novel, '*The Jungle*'").

takings cases. *See, e.g., Miller v. Schoene*, 276 U.S. 272, 280, 48 S.Ct. 246, 72 L.Ed. 568 (1928) (upholding a law requiring the destruction of cedar trees to prevent the spreading of cedar rust that imperiled nearby apple orchards); *Mugler v. Kansas*, 123 U.S. 623, 668, 8 S.Ct. 273, 31 L.Ed. 205 (1887) (rejecting a takings challenge to laws prohibiting the production or sale of intoxicating beverages). In the present case, we of course need not, and thus do not, conclude that the federal government has an absolute right to condemn or seize food, without any possible liability, merely because, as here, the government declares the food to be potentially dangerous or unhealthy.

Turning to the government's current position, at times the government appears to argue for a per se exception to a regulatory taking based on the regulation's public health purpose. In its opening brief, the government writes that "Rose Acre has no private property right dictating that the Government pay it to stop using its property in a manner that threatens public health." Yet, it never goes so far as to assert a blanket exception to the *Penn Central* analysis here. And, during oral argument, government's counsel was less than resolute in arguing that the law requires a per se exception to the *Penn Central*. But the government did argue that the character of the government's act, protecting the public health by identifying diseased eggs and forcing their owner to remove them from the table market, weighs strongly against finding a taking here. We agree.

Rose Acre, on the other hand, reads *Lingle*'s characterization of *Penn Central* as a demotion of the character prong to a secondary and optional factor. Citing the Supreme Court's description of *Penn*

Central, Rose Acre contends that we can only consider the public health aspect of the SE regulations in a diminished and optional role. *See* Rose Acre Br. 57 (arguing that "the Supreme Court deemphasized *Penn Central*'s character prong, holding it 'may' also be considered if relevant to the regulatory-takings analysis"). Putting aside the question of whether *Lingle* properly characterizes *Penn Central*, and disregarding that the quoted sentence is in no way a holding of *Lingle*, we do not believe *Lingle* caused any diminution in the importance of the *Penn Central* character prong, at least with respect to public health and safety regulations.

When we view what the law sets forth with respect to the selling of food for human consumption, we must recognize that—whether through criminal law, nuisance law, or tort law—the law has long imposed significant restrictions on the food-property owner. In the present case, "the severity of the burden that government impose[d] upon private property rights," *Lingle*, 544 U.S. at 539, 125 S.Ct. 2074, was not impermissible because the SE regulations restricted uses of personal property in which the restrictions were directed at the protection of public health and safety. That is the type of regulation in which the private interest has traditionally been most confined and governments are given the greatest leeway to act without the need to compensate those affected by their actions. *See Jacob Ruppert, Inc. v. Caffey*, 251 U.S. 264, 303, 40 S.Ct. 141, 64 L.Ed. 260 (1920) (prohibition on sale of "near beer" in order to make prohibition of alcoholic beverages more effective was a regulation "for the preservation of the public health" and not a taking); *Purity Extract & Tonic Co. v. Lynch*, 226 U.S. 192, 201, 33 S.Ct. 44, 57 L.Ed. 184 (1912) (noting the right of states to prohibit the sale

of intoxicating liquors); *N. Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306, 315, 29 S.Ct. 101, 53 L.Ed. 195 (1908) (recognizing a state's authority to seize unwholesome food "based upon the right and duty of the state to protect and guard, as far as possible, the lives and health of its inhabitants"). This assessment leads us to conclude that a regulation ending the production and sale of such eggs in the table market, although allowing their sale in the breaker market, cannot be described as imposing an undue burden on the egg producer. Furthermore, we need not determine that the proscribed activity constitutes a public nuisance in order to conclude that the character prong favors the government. *See Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1369 (Fed.Cir.2004) (rejecting appellants' position that, "because oil and gas exploration is not a public nuisance, the Court of Federal Claims improperly considered the concerns for public welfare in its *Penn Central* analysis"). Finally, for similar reasons, we cannot conclude that the SE regulations are "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539, 125 S.Ct. 2074.

In the end, the effect of *Lingle* in this case is for the character of the government's regulations to more strongly favor the government than when we examined the issue in *Rose Acre IV*.

D. Balancing of the Penn Central Factors

The purpose of the takings clause is to ensure fairness, to both the property owner and the public. *See Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960). When balancing the factors adduced through the *Penn Central* analy-

sis, our objective is to ascertain whether, in light of those factors, it is unfair to force the property owner to bear the cost of the regulatory action. In doing so, we can look to the outcomes in other cases, recognizing however that reference to isolated facts in other takings cases provides limited guidance. As frequently reminded, a regulatory takings analysis is generally an "ad hoc" analysis. *Penn Cent.*, 438 U.S. at 124, 98 S.Ct. 2646.

Litigants and commentators often put too much emphasis on any one of the Penn Central factors, based on the favorable outcome of prior cases. Reminding a court, as Rose Acre does, that a taking was found in *Yancey* when there was a diminution in value of only 77% is practically useless without further context. It is not that prior cases have no precedential value. Rather, the holding of each case must be carefully scrutinized and understood, within the context of the particular facts, in order to apply that holding faithfully in future cases. In other words, there is no magic number or formula in takings cases.

Furthermore, *Yancey* is quite distinguishable on its facts from the present case. In *Yancey*, the USDA imposed an emergency quarantine on poultry in an effort to contain an outbreak of pathogenic Avian Influenza, a highly contagious viral disease but generally of little risk to humans. 915 F.2d at 1536. The plaintiffs suffered a diminution of 77% in the value of their turkey breeder flock. *Id.* at 1539. Thus, unlike the present case, *Yancey* resolved a takings claim relating to governmental action causing a substantial decrease in property value in the absence of any significant threat of illness to the public. For

at least this reason, *Yancey* yields little support for Rose Acre's position.

When we review all the factual findings above, we conclude that they require a holding of no compensable taking. First, Rose Acre's economic impact is not severe. Second, although the reasonable investment-backed expectations favor Rose Acre, they are not strong enough to be dispositive. Third, the character of the government's regulations strongly favors a non-taking.

For comparison purposes, we note that the present case is quite similar as a whole to *Maritrans*. In *Maritrans*, we held that no compensable taking occurred when, in response to the 1989 Exxon Valdez oil spill, Congress enacted legislation requiring single-hulled oil tankers to be either retrofitted with double hulls or phased out of service. 342 F.3d at 1348-49. The single-hulled oil tankers owned by the plaintiff in *Maritrans* suffered a 13.1% diminution in value. *Id.* at 1358. That diminution in value is quite similar to the approximately 10% loss in value of the diverted eggs from Rose Acre's three affected farms, which were 43% of all the eggs produced there. We also noted in *Maritrans* that

> [t]he character of the governmental action factor requires a court to consider the purpose and importance of the public interest underlying a regulatory imposition, by obligating the court to "inquire into the degree of harm created by the claimant's prohibited activity, its social value and location, and the ease with which any harm stemming from it could be prevented."

Id. at 1356 (quoting *Creppel v. United States*, 41 F.3d 627, 631 (Fed.Cir.1994)).[9] We considered the law's public safety aspect, viz., "protecting the waterways of the United States from oil spills for environmental and navigational reasons." *Id.* at 1357. We also recognized that a finding in favor of the property owner "would have the effect of creating a disincentive for the government to enact publicly beneficial laws by requiring compensation every time a statute or regulation affects a property owner's interests." *Id.* In doing so, we concluded that the character of the governmental action weighed against the property owner. *Id.* at 1358. Thus, given the small diminution in value and the importance of the public safety aspect of the legislation, we affirmed the trial court's decision of no taking. That precedent, then, strongly supports our holding here, for the cases are analogous.

Although Rose Acre may feel otherwise, the law of regulatory takings does not generally compensate property owners when a regulation's economic impact is slight and temporary but the potential for physical harm to the public is significant. Here, infected eggs could have caused serious illness and possibly even death.

CONCLUSION

For the foregoing reasons, we hold that Rose Acre did not suffer a compensable taking when, due to the SE regulations, approximately 43% of its table eggs

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[9] While the language referring to "the ease with which any harm" could be prevented arguably invokes the *Agins* test, the other text refers to the question of whether the regulated activity constitutes a nuisance, as the quoted section from *Creppel* was applying the nuisance analysis in *Lucas*. *See Creppel*, 41 F.3d at 631.

were diverted to the breaker egg market, and where the eggs had an approximately 10% lower market value. Although Rose Acre's reasonable investment-backed expectations suggested a taking may have occurred, the economic impact of the regulations was not severe and the character of the government's actions strongly favored the United States. Returning to the touchstone of regulatory takings law, we conclude that, as analyzed under *Penn Central*, the SE regulations were not functionally comparable to government appropriation or invasion of private property and that the regulations properly placed the burden on Rose Acre to bear the costs associated with ensuring that their eggs did not injure the public. Accordingly, we hold that the United States is not liable to Rose Acre for just compensation.

REVERSED

APPENDIX B

UNITED STATES COURT OF APPEALS,
FEDERAL CIRCUIT

No. 03-5103

ROSE ACRE FARMS, INC.,
Plaintiff-Appellee,

v.

UNITED STATES,
Defendant-Appellant.

DECIDED: June 30, 2004.
Rehearing and Rehearing *En Banc*
Denied Oct. 22, 2004

Before NEWMAN, MICHEL, and RADER, *Circuit Judges.*

MICHEL, *Circuit Judge.*

Rose Acre Farms, Inc. ("Rose Acre") filed the present action in the United States Court of Federal Claims in 1992, claiming that United States Department of Agriculture ("USDA") regulations that restricted egg sales from and imposed other requirements on farms that tested positive for the presence of salmonella bacteria effected a taking requiring compensation under the Fifth Amendment. The trial court held that Rose Acre was entitled to compensation for a taking of the eggs affected by the regulations, *Rose Acre Farms, Inc. v. United States*, 55 Fed.Cl. 643, 660

(2003), as well as for hens seized for testing. *Id.* at 662. The court misapplied, however, the standards governing regulatory takings claims under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). In particular, the court incorrectly analyzed the severity of the economic impact of the regulations and erroneously concluded that the *Penn Central* factor pertaining to the character of the government's actions favored Rose Acre. The court further erred in concluding that the regulations effected a per se taking of Rose Acre's hens. Accordingly, we vacate and remand for appropriate reconsideration.

BACKGROUND

I. Rose Acre's Operations

Rose Acre is a family-owned business based in Seymour, Indiana. It is primarily engaged in the production of table eggs, which are raw poultry eggs sold in their shells. Between 1955 and 1990, Rose Acre grew from a single layer-hen farm with 1,800 hens to a highly integrated table-egg production business consisting of eight layer-hen farms with millions of hens. Three of Rose Acre's Indiana farms are at issue in this case, namely, Cort Acres (in Cortland), White Acres (in White County), and Jen Acres (in Jennings County).

The production units on each farm are individual layer houses having varying capacities. In 1990, Cort Acres had thirty-six layer houses, each of which contained approximately 70,000 hens, White Acres had twelve layer houses, each containing approximately 125,000 hens, and Jen Acres had twenty-two houses, twenty-one of which were in production with capacities ranging from 67,320 to 112,000 hens.

The details of Rose Acre's vertically integrated production system are set forth in the trial court's opinion. *Rose Acre*, 55 Fed.Cl. at 647. We note here, though, that all of the layer hens in a given layer house at any one time are, as a result of Rose Acre's production system, approximately the same age. Once young hens capable of laying eggs are placed in a layer house, production in that house normally continues uninterrupted for a period of about fifty-seven to sixty weeks, until the hens therein reach the end of their productive lives. When that cycle has ended, the hens are removed and destroyed, and the house is cleaned before new hens are introduced.

To maximize its production and provide a consistent supply of table eggs to the market, Rose Acre must carefully manage its layer house population and depopulation schedules. The trial court found that "[s]cheduling and timing . . . are key components of [Rose Acre's] business. An interruption in [Rose Acre's] scheduling system affects the entire organization, thus causing [Rose Acre] to be unable to supply eggs to its customers." *Id.*

II. USDA's Salmonella Regulations

A. The Interim Regulations

In the late 1980s, the Centers for Disease Control ("CDC") determined that the incidence and geographic spread of human illness resulting from exposure to Salmonella enteritidis serotype enteritidis ("SE") bacteria was increasing.[1] In response to the increase,

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[1] According to the trial court:

> *Salmonella* is a gram negative rod-shaped microscopic bacterium that is ubiquitous. There are more than 2,000 serotypes (strains) of *salmonella*, and it is most commonly

the Animal Plant Health and Inspection Service ("APHIS"), a USDA division responsible for preventing the spread of communicable diseases, determined that emergency regulations were necessary to control the spread of SE in poultry flocks. On February 16, 1990, USDA published interim regulations that restricted the interstate sale and transportation of eggs and poultry from flocks determined under the regulations to be SE-contaminated. Poultry Affected by Salmonella Enteritidis, 55 Fed.Reg. 5576 et seq. (1990) (codified at 9 C.F.R. §§ 82.30-82.36 (1991)). The interim regulations were effective immediately upon publication, USDA having "determined that there is good cause for publishing this rule without prior opportunity for public comment," namely, the need for "[i]mmediate action . . . to prevent harm to the egg-type chicken industry and the public." *Id.* at 5580.

The interim regulations applied to "flocks," defined as "[a]ll the poultry on one premises," 9 C.F.R. § 82.30 (1991), and operated as follows. If "a Federal or State representative determine[d] through epidemiologic investigation that [a] flock [was] the probable source of disease in an outbreak of [SE-caused] disease in humans or poultry," USDA designated the flock as a "study flock." *Id.* § 82.32. A study flock was subse-

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found in the intestinal tract of animals and birds. Persons can be exposed to *salmonella* in many ways, but the most likely exposure is through the consumption of raw or undercooked foods of animal origin, such as meat, poultry, milk or eggs. When a person becomes sick from consuming *salmonella*, the condition is referred to as salmonellosis. Symptoms in humans include nausea, vomiting, abdominal cramps, diarrhea, fever and headache.

Rose Acre, 55 Fed. Cl. at 648 n. 5.

quently designated a "test flock" if either (1) "one or more" environmental test samples, i.e., "manure samples and egg transport machinery samples . . . collected and tested in accordance with" procedures set forth in the interim regulations tested positive for SE, or (2) "the person in control of the flock" refused to allow or interfered with the collection of such samples. *Id.* § 82.32(b). At the time the interim regulations were published, USDA believed that evidence of SE in layer hens' environment meant that the hens were infected and would, therefore, be more likely to produce SE-contaminated eggs. *See* 55 Fed.Reg. at 5576 (describing the "vertical" (hen to egg) and "horizontal" (environment to hen) modes of SE transmission).

"Test flock" status triggered restrictions on the interstate movement of eggs. Specifically, eggs from a test flock could be moved interstate only for uses requiring pasteurization,[2] and then only if the shipper obtained a permit and met other conditions. 9 C.F.R. § 82.33(a) (1991). Thus, the interim regulations prohibited the interstate shipment of test flock eggs for sale as table eggs.

Specified numbers of the hens in test flocks were also required to undergo blood and internal-organ testing. *Id.* § 82.32(c). A test flock was designated an "infected flock" if the organs of one or more hens tested positive for SE. *Id.* Infected flocks were subject to the same interstate transportation restrictions as test flocks. *Id.* § 82.33(a). An infected flock retained

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[2] According to Rose Acre, such uses include incorporation into products such as cake mixes. The facilities that process and pasteurize eggs for these uses are known as "breaker plants" and the eggs they process are known as "breaker eggs."

its "infected" designation until either (1) the flock was retested in accordance with the regulations and no internal organ tested positive for SE or (2) the houses that contained the infected flock were depopulated, subjected to specified wet cleaning and disinfecting procedures, and repopulated with a new flock. *Id.* § 82.32(c).

B. The Final Regulations

After USDA reviewed comments received from interested parties following the publication of the interim regulations, it published final SE regulations on January 30, 1991. Chickens Affected by Salmonella enteritidis, 56 Fed.Reg. 3730 (1991) (codified at 9 C.F.R. §§ 82.30-82.38 (1992)). The final regulations incorporated all of the above requirements, but authorized the imposition of restrictions on individual layer houses as opposed to whole flocks. 9 C.F.R. § 82.33(a). A provision conditioning release from "infected" status on a successful post-cleaning inspection of a depopulated infected house by a federal or state official was added. *Id.* § 82.37. Additional testing and retesting requirements were imposed on all houses on the same premises as any infected house. *Id.* § 82.38.

APHIS administered these SE regulations until mid-1995. A total of thirty-eight flocks were restricted between 1990 and 1994, resulting in over 1.3 billion eggs being diverted from the United States table egg market to breaker plants.

III. Rose Acre Tracebacks

In 1990, after the interim regulations took effect, SE illness outbreaks were traced to each of Cort Acres, White Acres and Jen Acres. As a result of testing carried out in accordance with the interim regulations,

USDA first restricted the interstate transportation of eggs from these three farms on October 5, 1990, November 27, 1990, and January 15, 1991, respectively. In each case, Indiana officials similarly restricted the intrastate transportation of eggs (except for uses requiring pasteurization) shortly after receiving notice of the federal restrictions.

After "test flock" restrictions were imposed as a result of environmental testing at each affected Rose Acre farm, USDA conducted blood and organ testing as set forth in the regulations. For organ testing, USDA employees physically removed 60 hens (whose blood had tested positive) from each house, killed them, and transported their carcasses to a USDA laboratory in Ames, Iowa. As described above, a single positive organ result in a given house resulted in an "infected house" designation.[3] No additional transportation restrictions were imposed as a result of an "infected" designation; obtaining release from restricted status, however, became more difficult. At first, Rose Acre tried to obtain release through continued organ testing of the hens in infected houses. For the most part, however, Rose Acre had to depopulate, clean, and disinfect infected houses, and then have those houses pass USDA inspection. The trial court noted that in some cases, houses were empty for long periods while awaiting inspection. *Rose Acre*, 55 Fed.Cl. at 651. It also noted that USDA inspection officials did no more than visually examine the interior of depopulated houses (after cleaning) with the aid of flashlights. *Id.*

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[3] As noted above, by January 30, 1991, the regulations permitted the imposition of restrictions on a house-by-house basis.

Rose Acre finally succeeded in obtaining release from the restrictions imposed on Cort Acres, White Acres, and Jen Acres on July 16, 1992, May 8, 1992, and October 30, 1992, respectively. Thus, for a period of twenty-five months, Rose Acre was unable to sell eggs as table eggs from one or more of the three farms.

IV. Rose Acre's Legal Challenges

Shortly after its operations became subject to the federal and state restrictions, Rose Acre filed an action in the United States District Court for the Southern District of Indiana seeking a declaration that the interim regulations were invalid. In that action, Rose Acre contended that (1) the interim and final regulations deprived Rose Acre of due process, (2) the interim regulations were not promulgated in accordance with the Administrative Procedure Act, (3) both sets of regulations exceeded USDA's statutory authority, (4) the final regulations could not be applied retroactively, (5) both sets of regulations unlawfully delegated authority to state officials, (6) the application of certain monitoring provisions was invalid, and (7) it was entitled to compensation for eggs diverted to breaker plants. *Rose Acre Farms, Inc. v. Madigan*, No. NA 90-175-C, 1991 U.S. Dist. LEXIS 8691, at *3-4 (S.D. Ind. June 5, 1991). Ultimately, the United States Court of Appeals for the Seventh Circuit held that the regulations were neither arbitrary nor capricious and were promulgated within the authority of the Secretary of Agriculture. *Rose Acre Farms, Inc. v. Madigan*, 956 F.2d 670, 675-77 (7th Cir.1992) ("*Rose Acre I*"). It further held that "[i]t is to the claims court that Rose Acre must go" to pursue any claim for compensation. *Id.* at 674.

Rose Acre filed the present action in the Court of Federal Claims on October 13, 1992, alleging violations of 21 U.S.C. §§ 114a [4] and 134a [5] (2000) and an uncompensated taking of its eggs and hens. The trial court granted the government's motion to dismiss Rose Acre's section 114a claim for failure to state a claim, *Rose Acre*, 55 Fed.Cl. at 653, and held, after a two-week trial, that section 134a provides Rose Acre no relief beyond that available under the Fifth Amendment, *id.* at 662. The trial court awarded Rose Acre compensation in the amount of $6,165,297.72 for what it held was a regulatory taking of its eggs di-

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[4] 21 U.S.C. § 114a has since been repealed. Pub.L. No. 107-171, tit. X, § 10418(a)(8) (May 13, 2002), 116 Stat. 508. It provided, in relevant part:

> The Secretary of Agriculture, either independently or in cooperation with States or political subdivisions thereof, farmers' associations and similar organizations, and individuals, is authorized to control and eradicate any communicable diseases of livestock or poultry . . . which in the opinion of the Secretary constitute an emergency and threaten the livestock industry of the country, including the payment of claims growing out of destruction of animals (including poultry), and of materials, affected by or exposed to any such disease, in accordance with such regulations as the Secretary may prescribe.

[5] 21 U.S.C. § 134a has since been repealed. Pub.L. No. 107-171, tit. X, § 10418(a)(17) (May 13, 2002), 116 Stat. 508. It authorized the seizure, quarantine, and disposal of livestock or poultry to guard against the introduction or dissemination of communicable disease and further provided, in relevant part:

> [T]he Secretary shall compensate the owner of any animal, carcass, product, or article destroyed pursuant to the provisions of this section . . . . Compensation paid any owner under this subsection shall not exceed the difference between any compensation received by such owner from a State or other source and such fair market value of the animal, carcass, product, or article.

verted to breaker plants and a categorical taking of the hens confiscated for internal-organ testing. *Id.* at 664. The court also awarded Rose Acre $2,414,744.81 in attorney fees and expenses. *Id.* at 670.

The government appeals, challenging the trial court's holding that the government actions at issue here constituted a regulatory taking and a categorical taking and the award of fees and expenses (as based on an erroneous judgment that takings occurred). We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

A determination of whether a taking compensable under the Fifth Amendment has occurred is a question of law based on factual underpinnings. *Alves v. United States*, 133 F.3d 1454, 1456 (Fed.Cir.1998). Thus, we review the trial court's legal analysis and conclusions de novo and its findings of fact for clear error. *Bass Enters. Prod. Co. v. United States*, 133 F.3d 893, 895 (Fed.Cir.1998).

The trial court analyzed Rose Acres claim for compensation for its diverted eggs under regulatory takings law and applied the law of categorical takings to the claim for compensation for the hens.

I. Diverted Eggs: Regulatory Takings Claim

Rose Acre acknowledged and the trial court recognized that the government may regulate private property to some extent without subjecting itself to takings liability. *Rose Acre*, 55 Fed. Cl. at 656. Otherwise, "[g]overnment could hardly go on . . . . " *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 67 L.Ed. 322 (1922). However, "if regulation goes too far it will be recognized as a taking." *Id.* at 415, 43 S.Ct. 158.

The challenge, of course, is determining how far is "too far." A regulatory takings claim "'arises from some public program adjusting the benefits and burdens of economic life to promote the common good,'" as opposed to a government appropriation of private property for its own use. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324-35, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002) (quoting *Penn Central*, 438 U.S. at 124, 98 S.Ct. 2646). When a takings claim arises from the former, it is necessary to determine whether justice and fairness require that economic injuries caused by public action be compensated by the government, rather than rmain disproportionately concentrated on a few persons. Penn Central, 438 U.S. at 124-25, 98 S.Ct. 2646. No per se rules or "set formula[s]" govern such determinations; instead, courts "engag[e] in . . . essentially ad hoc, factual inquiries." *Id.* The Supreme Court has, however, identified several factors having particular significance, namely, the "economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action." *Id.* Application of these Penn Central criteria is required where, as here, "less than a 'complete elimination of value'" resulted from the regulation at issue. Tahoe-Sierra, 535 U.S. at 330, 122 S.Ct. 1465 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019-20 n. 8, 112 S.Ct. 2886, 120 L.Ed.2d 798 (2002)).

The trial court held that each of these factors favored Rose Acre, and, as a result, Rose Acre was entitled to compensation for the revenue it lost as a consequence of the diversion of its eggs to the breaker egg market. As to two of the three factors, however, the trial courts analysis was incorrect. Remand for

reconsideration of the evidence under the applicable legal standards, and for a weighing of those factors in accordance with the standards set forth in *Penn Central* and its progeny to determine whether compensation is required under the Fifth Amendment, is, therefore, necessary.

A. Economic Impact

The government did not dispute that Rose Acre sold over 97% of the eggs it produced at the three farms as table eggs before its sales were restricted. It also does not challenge the trial court's findings that (1) after the restrictions were lifted, Rose Acre immediately returned to selling over 97% of its eggs as table eggs, (2) both before and during the period of restriction, Rose Acre sold 90% of its eggs in interstate commerce and 10% in intrastate commerce, (3) Rose Acre diverted over 57.5 million dozen eggs (nearly 700 million eggs) to breaker plants during the restricted period, (4) the average price Rose Acre and other sellers received for table eggs during the restricted period was 59 cents per dozen, (5) the average total cost for Rose Acre to produce a dozen eggs during the period of restriction was 54.96 cents, (6) during the restricted period, Rose Acre processed 33,753,843 dozen restricted eggs in breaker plants it owned and sold 24,006,780 dozen restricted eggs to breaker plants owned by others, and (7) Rose Acre received an average of 46.64 cents per dozen for eggs processed in its own breaker plants and an average of 41.46 cents per dozen for eggs sold to outside breaker plants during the restricted period. The government does, however, challenge the trial court's finding that "[t]he economic impact of the diversion was . . . severe."

The trial court's analysis of the economic impact was limited to (1) making the above-noted findings, (2) noting that government witnesses testified that "the restrictions could mean financial ruin for table egg producers," "'[b]reaker eggs are not rewarding,'" and "producers faced considerable revenue losses from the required diversion of eggs," and that the government's expert estimated Rose Acre's loss on breaker eggs to exceed $9.2 million, and (3) favorably comparing Rose Acre's situation to that of the plaintiff in *Yancey v. United States*, 915 F.2d 1534 (Fed. Cir. 1990), where we held that a USDA-imposed quarantine had effected a taking of healthy breeder turkeys. *Rose Acre*, 55 Fed.Cl. at 657-58. This analysis was insufficient.

The trial court noted that a large number (57.5 million dozen) of Rose Acre's eggs were, as a result of the restrictions, diverted for sale at less than Rose Acre's average total cost of production. However, neither the testimony nor the economic data cited by the trial court appropriately gauge the *severity* of the economic *impact* of the regulations *on Rose Acre*. The cited testimony is not specific to Rose Acre, and the data-divorced from any economic context-represents only the first step in the required analysis. Simply put, it is not possible to determine the economic impact of a regulatory scheme applied to a private actor without casting the appropriate absolute measures of the effect of the regulation against the backdrop of relevant indicators of the economic vitality of the actor. In the present case, some of the eggs on some of Rose Acre's farms suffered a reduction in value. In addition, while the reduction in value of each affected egg was permanent, the period during which the regulations had an impact on Rose Acre's operations was relatively brief—approximately two years—after

which Rose Acre reverted to its pre-regulation table-egg sales levels. The trial court's opinion reflects no consideration of these factors. Yet, an assessment of the severity of the economic impact of the regulations on Rose Acre, in accordance with *Penn Central* and its progeny, must take them into account.

In regulatory takings cases concerning diminished real estate values, this concept is known as the "parcel as a whole." *Penn Central*, 438 U.S. at 130-31, 98 S.Ct. 2646. The Supreme Court has noted:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the "landmark site."

Id. The Court recently elaborated on this concept, stating:

> This requirement that "the aggregate must be viewed in its entirety" explains why, for example, a regulation that prohibited commercial transactions in eagle feathers, but did not bar other uses or impose any physical invasion or restraint upon them, was not a taking. *Andrus v. Allard*, 444 U.S. 51, 66, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979). It also clarifies why restrictions on the use of only limited portions of the parcel, such as setback ordinances, *Gorieb v. Fox*, 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228 (1927), or a requirement that coal pillars be left in place to prevent mine sub-

> sidence, *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. [470,] 498, 107 S.Ct. 1232, 94 L.Ed.2d 472 [(1987)], were not considered regulatory takings.

Tahoe-Sierra, 535 U.S. at 327, 122 S.Ct. 1465.

The methodologies used to determine how much of an affected owners property constitutes the relevant "parcel" in real estate takings cases are not, of course, directly applicable to a case such as the present. Nonetheless, a determination of the relative economic effect of the regulations is required. See *Penn Central*, 438 U.S. at 130, 98 S.Ct. 2646 ("[T]he submission that [the claimants] may establish a taking simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available is quite simply untenable.").

Rose Acre recognizes this, and thus defends the trial courts finding that the economic impact was severe by arguing that the relevant "parcel," or "denominator in the takings fraction," *Palazzolo v. Rhode Island*, 533 U.S. 606, 631, 121 S.Ct. 2448, 150 L. Ed.2d 592 (2001), in this case was each individual restricted egg, or, since all of the eggs in a given affected house were restricted, each affected house. Based on the difference between the revenue that would have been obtained for those eggs but for the restrictions (found by the district court to be 59 cents per dozen) versus that actually obtained for those eggs in the breaker market during the period of restriction (which the district court found to be 46.64 and 41.46 cents per dozen for the eggs processed in Rose Acres own breaker plants and those sold to outside breaker plants, respectively), Rose Acre argues that the relevant diminution in value was 26.1%.

The government, in contrast, argues that the relevant parcel is the total combined production of the three affected farms. It then argues that the 59 cent-per-dozen price found by the district court to be the prevailing price of table eggs during the period of restriction cannot properly be applied to either (1) the total egg production of the three affected farms during the period of restriction (if the governments denominator is used), or (2) the egg production of the affected houses (if Rose Acres "denominator" is used), because Rose Acre argued (and the district court found) that even before the regulations took effect nearly three percent of Rose Acres eggs were sent to breaker plants. The government bases its economic analysis, instead, on a table-egg price of 57.62 cents per dozen, which takes into account Rose Acre's three percent "baseline" breaker egg rate. Given that 42.6 percent of the eggs produced by the three affected farms were diverted to breaker plants during the period of restriction, it argues that the appropriate diminution-in-value figure for purposes of evaluating the severity of the economic effect on Rose Acre is 10.6. Moreover, argues the government, neither the 10.6 diminution it asserts nor the 26.1 diminution asserted by Rose Acre comes close to the 77.2 diminution in value suffered by the plaintiffs in Yancey, the case the trial court regarded as analogous.

In *Yancey*, USDA imposed an emergency quarantine on poultry in an effort to contain an outbreak of pathogenic Avian Influenza, a highly contagious viral disease. 915 F.2d at 1536. The Yanceys maintained a flock of turkey breeder hens and toms for purposes of selling turkey hatching eggs in interstate commerce. *Id.* Despite the fact that testing showed the turkeys were not diseased, the Yanceys decided to sell their turkey flock for meat after the quarantine was im-

posed, because of the quarantine's indefinite nature. *Id.* This court affirmed a decision that the Yanceys were entitled to compensation under the Fifth Amendment, *id.* at 1542, based on the 77% reduction (from $91,616 to $20,887, the amount received from the slaughter) in the value of their turkey breeder flock, *id.* at 1539.

We recognized in *Yancey* that comparable or even larger diminutions in value had been held insufficient for takings purposes in particular cases. *See id.* at 1541 (citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926) (holding that a 75% value diminution caused by a zoning law did not constitute a taking), and *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (holding that no taking resulted from an 87 1/2 % diminution in value)). We rejected the notion that such cases set a minimum value diminution that, as a matter of law, had to be demonstrated for liability to lie. *Id.* In so doing, we recognized that "the modern *Penn Central* approach" requires a balancing of "all the relevant considerations." *Id.*

Nonetheless, in apparent recognition of the significant disparity between the diminution in value in this case, even under Rose Acre's view of the appropriate denominator, and that found in *Yancey*, Rose Acre argues in the alternative that the trial court's finding as to economic effect should be sustained based upon an analysis of the loss it says it suffered on sales of the restricted eggs. Under this alternative diminution-in-return (profit-based) approach, using the same denominator and table-egg and breaker-egg prices on which it relies in its above-described diminution-in-value calculation, Rose Acre argues that it earned a return of -15.14% on breaker eggs processed

by its own breaker plants and a return of -24.56% on eggs sold to outside breaker plants, compared with the +7.35% return it would have received for those eggs had they been sold as table eggs. These results are based on Rose Acre's average total cost (fixed plus marginal) of producing an egg destined for the table egg market across all of its farms, which total cost, apparently undisputed by the government, is 54.96 cents per dozen.[6]

Rose Acre notes that resulting *diminution* in return (306% and 434%, respectively, for breaker eggs it processed and those sold to outside breaker plants, respectively), is much larger than the 96% diminution we held sufficient to support a takings holding in *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed.Cir.2003). Perhaps anticipating the government's argument that a returns-based approach is better suited to situations involving property, such as real property, that has the ability to generate income over a long term, Rose Acre notes that the Claims Court in *Yancey* cited the Yanceys' investment loss in support of its conclusion that a compensable taking had occurred:

> Even considering the receipt of $21,496 from the Commonwealth of Virginia, plaintiffs incurred a substantial loss on their investment. Although plaintiffs were able to mitigate their loss by

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[6] The government objects to consideration of this alternative analytical method on appeal, noting that Rose Acre did not present a profit-based justification to the trial court. The government, however, fails to elaborate on its contention that it "did not have an opportunity to develop the record specifically to address these new arguments", and as Rose Acre notes, the government does not contest the cost and price findings that underlie Rose Acre's profits analysis.

> slaughtering the flock, there was no other alternative, economically viable use for the flock while the quarantine was in effect.

Yancey v. United States, No. 413-85C, slip op. at 17 (Cl.Ct. Dec.12, 1988).

Again, however, whether the alternative (breaker) use here was "economically viable" depends on the variables factored into the analysis. The government, in addition to noting that the 59-cents-per-dozen table-egg price fails to account for the three percent of eggs Rose Acre usually sends to breaker plants and advocating use of a three-affected-farms "parcel," disputes the propriety of relying on total cost. It argues, instead, that only Rose Acre's marginal cost—the cost of producing each egg over and above Rose Acre's fixed, operation-wide costs—is the appropriate basis for determining the return Rose Acre earned on the restricted eggs. The government's values, it notes, result in a 64.44% return for those eggs versus the 83.91% return Rose Acre would otherwise have enjoyed (i.e., on sales as table eggs). Even using Rose Acre's "parcel," application of the marginal cost basis yields a profit of 42.03%—a lower return than that achieved for the three affected farms as a whole, but a positive one, nonetheless—and a diminution in return of 52%. Still another potential measure of the impact of the restrictions on Rose Acre is obtained using the 57.72 cent-per-dozen table-egg price (to take into account the three percent of eggs Rose Acre usually sent to breaker plants), the government's "denominator" (the three affected farms), and Rose Acre's total cost figure. These figures result in a -6.3% return on the breaker eggs versus a +4.8% return Rose Acre would have enjoyed but for the restrictions. The difference is a 231% diminution in return.

All of which is to note that there are a number of different ways to measure the severity of the impact of the restrictions on Rose Acre. As noted above, the trial court's opinion does not reflect consideration of these various alternatives, or explicitly rest its conclusion that the impact was severe on any appraisal of the effect of the restrictions relative to Rose Acre's relevant unaffected property interests.

The trial court's discussion of the economic impact factor is not entirely unrevealing, however. It suggests that the trial court may have applied a profits-based analysis, as it quotes our reference in *Yancey* to the observation of the trial court there that "'[a]lthough plaintiffs were able to mitigate their loss by slaughtering the flock, there was *no other alternative*, economically viable use for the flock while the quarantine was in effect.'" *Rose Acre*, 55 Fed. Cl. at 658 (quoting *Yancey*, 915 F.2d at 1539 (quoting *Yancey*, slip op. at 17 (emphasis added))). By way of favorable comparison to *Yancey*, the trial court noted that diversion of the restricted eggs to the breaker market "was not an economically viable option for [Rose Acre] because it was not able to recoup its investment in these diverted eggs." *Id.* This language suggests that the trial court accepted Rose Acre's contention that its total average cost provided the appropriate basis for a returns-based calculation, for, as noted above, only when the 54.96 cent-per-dozen cost figure is used do the calculations yield negative returns: -15.14% and -24.56%, respectively, for the Rose Acre-breaker-plant- and outside-breaker-plant- processed eggs, if the restricted houses constitute the "denominator," versus a -6.3% return if the "denominator" is the three farms (taken together).

We reject the government's contention that a returns-based analysis is per se less suitable than one based on diminution in value in the present case. If anything, it appears that the latter is less appropriate where, as here, the issue concerns the economic impact, albeit temporary, of government regulations on a going business concern. We need not choose, however, between these two analytical modes. Several observations regarding their proper use, though, are required.

The government challenges Rose Acre's returns-based analysis, arguing that the relevant denominator is the combined total egg sales from the *three farms* during the period of restriction, but that profit should be figured using only the marginal cost to Rose Acre of producing each individual egg in the *restricted houses*. Rose Acre argues precisely the reverse, asking that we look only at the revenue derived from the sale of (breaker) eggs from the *restricted houses*, but determine its profit using its total cost, including the (allocated) fixed costs it incurs in producing eggs in all of the houses on *all its farms*. We believe neither is appropriate, as the inconsistency built into each inaccurately prejudices the result.

Moreover, whether the economic impact is judged by value decline or profitability decrease, an evaluation based on Rose Acre's asserted "denominator"—the restricted houses—runs afoul of the "parcel as a whole" principle announced in *Penn Central* and illustratively applied in *Keystone Bituminous*. In the latter, a Pennsylvania statute restricted (for subsidence purposes) the amount of coal that could be removed from a given mine. *Keystone Bituminous*, 480 U.S. at 476-77, 107 S.Ct. 1232. The Supreme Court specifically rejected the plaintiffs' contention that the

restricted coal—less than two percent of the total coal in the thirteen mines they operated—was the relevant "denominator," noting:

> [P]etitioners have sought to narrowly define certain segments of their property and assert that, when so defined, the Subsidence Act denies them economically viable use . . . .
>
> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property "whose value is to furnish the denominator of the fraction." . . .
>
> . . .
>
> The 27 million tons of coal [required to be left in place] do not constitute a separate segment of property for takings law purposes. Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area as readily as the requirement that coal pillars be left in place. Similarly, under petitioners' theory one could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes . . . . There is no basis for treating the less than 2% of petitioners' coal as a separate parcel of property.
>
> . . .

> When the coal that must remain beneath the ground is viewed in the context of any reasonable unit of petitioners' coal mining operations and financial-backed expectations, it is plain that petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of that property . . . .

Id. at 495-99, 107 S.Ct. 1232. The analogies to the present set of facts are apparent. As in *Keystone Bituminous* (and as discussed more fully below), the regulation at issue was an exercise of the government's police powers, designed to protect the health and safety of the populace. There, as here, the regulation reduced the value of a portion of Rose Acre's property,[7] even if only the three farms implicated by the 1990 tracebacks are considered.[8] And, significantly, the restricted portion—the eggs here, the coal in *Keystone Bituminous*—comprised fungible units of the owner's stock of property.

Thus it would seem that the "parcel as a whole" rule applies with even greater force here, where no unique attribute inherent in the restricted portion provides a basis for distinguishing it from the unre-

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[7] As noted, less than two percent of the owners' coal in *Keystone Bituminous* was restricted, *Keystone Bituminous*, 480 U.S. at 495, 107 S.Ct. 1232, compared with 42.6 percent of the eggs from the three farms here. However, in *Keystone Bituminous*, the value of the restricted coal was entirely diminished, "since [the coal] has no other useful purpose if not mined," *id.* at 496-97, 107 S.Ct. 1232, whereas the restricted eggs suffered an average reduction in value of 26.1%, according to Rose Acre.

[8] The government did not assert that the eight Rose Acre egg farms operating in 1990 (taken together), constituted the relevant denominator, and neither party advocated individual consideration of each of the three farms.

stricted portion, than might be the case with real property. Rose Acre tries to overcome this fact by arguing that the regulations were applied on a house-by-house basis. It is true that the interstate and intrastate transport *restrictions* were applied ultimately to individual houses, but the tracebacks that resulted in the "study flock" designation at each of Cort Acres, White Acres, and Jen Acres (triggering the environmental testing that ultimately led to the identification of the restricted "test houses") were, in accordance with the interim and final regulations, directed to each farm as a whole. 9 C.F.R. § 82.32(a) (1991) (interim regulations); 9 C.F.R. § 82.32(a) (final regulations). Additionally, as long as any one house on any farm was designated as an "infected house," all other houses on that farm were required to undergo testing for purposes of monitoring. 9 C.F.R. § 82. 38. Thus, as a matter of law, because the regulations at issue applied to each farm as a whole, their economic impact cannot be measured by considering the restricted houses alone. Severance of the restricted property for purposes of the economic analysis was held improper in *Keystone Bituminous*, where the regulation at issue did not include such premise-wide features. Here, then, such severance is even less appropriate.

On remand, then, using the three farms (combined) as the relevant "denominator," the trial court must determine whether the economic impact in this case is best measured by the value decline (a 10.6% diminution) or profitability decrease (at most, a reduction from a 4.8% profit to a 6.3% loss) caused by the restrictions. Either conclusion marks only the first step in the takings analysis, however, because, as discussed below, the court must weigh the private and public interests reflected in the application of the

three *Penn Central* criteria to the circumstances of this case.

B. Reasonable Investment-Backed Expectations

The government assigns error to the trial court's conclusion that this factor favored Rose Acre. As the trial court noted, "[t]his factor limit[s] takings recoveries to owners who [can] demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." *Rose Acre*, 55 Fed.Cl. at 658 (quoting *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177 (Fed. Cir. 1994)).

The trial court noted that, although the poultry industry in general is highly regulated, government experts previously believed that salmonella could contaminate the interior of a shell egg only via a crack or break in the shell. *Id.* at 659 (citing a government expert's testimony regarding the 1970s-era belief held by the Food and Drug Administration and the CDC that shell eggs were not associated with food-borne diseases). Accordingly, prior to 1990, eggs were subject only to inspection and restriction for evidence of potential environmental contamination. *See id.* (citing 21 U.S.C. §§ 1031-1056).

The government seeks to define the field of relevant regulation more broadly, citing to long-standing regulations aimed at preventing the spread of communicable diseases in birds and poultry. *See* 21 U.S.C. §§ 111-135 (West 1972 & Supp.1994); 9 C.F.R. Part 82. It argues that a new regulation aimed at a specific, recently-recognized disease threat was not unforeseeable in such an environment. But the SE regulations were more than an extension of comparable regulations to a new disease. They were grounded

in new scientific understanding (i.e., that salmonella could be transmitted from hen to egg) and were unprecedented in their reliance on environmental and hen testing. Accordingly, even accounting for the history of regulation in the poultry and egg industries, we cannot agree that the trial court erred in concluding that this factor favors Rose Acre.

C. Character of the Government's Action

The Supreme Court explained the need for inquiry into the character of the government's action as follows: "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124, 98 S.Ct. 2646 (citation omitted). The *Penn Central* majority cited with approval in this regard a decision holding that no compensation under the Fifth Amendment was due orchard owners ordered to cut down their ornamental cedar trees infected with cedar rust to protect neighboring apple orchards. *Id.* at 125-26, 98 S.Ct. 2646 (citing *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928)). This decision so held based solely on the power of the state to prevent impending harm to a valuable public resource—the apple industry. *Miller*, 276 U.S. at 279-80, 48 S.Ct. 246 ("[W]here the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property."); *see also Goldblatt v. Hempstead*, 369 U.S. 590, 594, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) ("Although a comparison of values before and after" a

regulatory imposition "is relevant, . . . it is by no means conclusive . . . . " (citation omitted)).

As noted above, *Keystone Bituminous* also sprang from a police power regulation-action on the part of the Commonwealth of Pennsylvania "to protect the public interest in health, the environment, and the fiscal integrity of the area." *Keystone Bituminous*, 480 U.S. at 488, 107 S.Ct. 1232. The Court there noted that "the nature of the State's interest in the regulation is a critical factor in determining whether a taking has occurred." *Id.* It reaffirmed the principle that "no individual has a right to use his property so as to create a nuisance or otherwise harm others," and noted that "the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." *Id.* at 492, 107 S.Ct. 1232.[9]

The trial court acknowledged these principles and the government's reliance thereon. *Rose Acre*, 55 Fed.Cl. at 659-60 (quoting *Creppel v. United States*, 41 F.3d 627, 631 (Fed.Cir.1994) ("If the regulation prevents what would or legally could have been a nuisance, then no taking occurred. The state merely

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[9] The Court in *Keystone Bituminous* held that the regulation at issue—the Bituminous Mine Subsidence and Land Conservation Act, Pa. Stat. Ann., Tit. 52, § 1406.1 et seq. (Purdon Supp . 1986)—"plainly seeks to further" a "substantial" public interest, and that courts "in many [such] instances" have held that no compensation is required. *Keystone Bituminous*, 480 U.S. at 492 & n. 22, 107 S.Ct. 1232 (citing cases). Nonetheless, the Court expressly declined to "rest [its] decision on this factor alone, because [the claimants] also failed to make a showing of diminution of value sufficient to satisfy the test set forth in *Pennsylvania Coal [Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922)] and [the Court's] other regulatory takings cases." *Keystone Bituminous*, 480 U.S. at 492, 107 S.Ct. 1232.

acted to protect the public under its inherent police powers.")).[10] The court recognized that "[s]almonella may be considered a nuisance," and that "the public has a strong interest in eating safe food." *Id.* at 660. The court held, however, that this "character" factor also favored Rose Acre because the means chosen by the government were inappropriate. *Id.* ("A regulation that burdens private property may 'constitute a "taking" if [the burden is] not reasonably necessary to the effectuation of a substantial public purpose.'" (quoting *Penn Central*, 438 U.S. at 127, 98 S.Ct. 2646)). Specifically, the trial court concluded that "the SE regulations were misguided because they relied on ineffective testing methods . . . . [T]he regulations at issue went too far in protecting [the public] interest by prohibiting the sale of [Rose Acre's] healthy eggs as table eggs." *Id.*

In support of its conclusion that the regulations were "misguided," the trial court noted (1) the government "never sought to have the eggs tested, despite the fact that they were the alleged sources of

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[10] The government's Commerce Clause powers are, of course, the source of the regulatory authority in this case. *See Wright v. United States*, 14 Cl.Ct. 819, 824 (1988); *Loftin v. United States*, 6 Cl.Ct. 596, 611 (1984) ("[R]egulations promulgated under the authority of the commerce clause often have the quality of police regulations" (citing *Currin v. Wallace*, 306 U.S. 1, 11-12, 59 S.Ct. 379, 83 L.Ed. 441 (1939)); *Rose Acre*, 55 Fed.Cl. at 660 n. 44) ("Unlike state governments, the federal government has no inherent police power." (citing *United States v. Morrison*, 529 U.S. 598, 619 n. 8, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000))). Rose Acre does not challenge the government's authority to promulgate the regulations at issue, that authority having been upheld by the Seventh Circuit. *Rose Acre I*, 956 F.2d at 675-77. It merely questions "whether the method of attaining the sought-after goal was reasonably designed to attain it." *Loveladies*, 28 F.3d at 1176.

the SE outbreaks," (2) after Rose Acre completed the wet cleaning procedures required in lieu of achieving consecutive negative hen tests, "the government never retested the environment or the hens," confining its inspection to "a simple walk through of the houses with a flashlight," (3) SE is ubiquitous in the environment, and is impossible to eradicate, and (4) SE-infected hens "shed" the bacteria intermittently; a hen with SE, therefore, may never lay an infected egg. *Id.* at 655 & n. 29. It further found that

> [The government] was aware in the late 1980's that SE could exist inside an egg. In addition, the scientific technology for testing the inside of eggs existed at the time the regulations were enacted. Such testing was used in the United Kingdom and during [the government's] Pennsylvania Pilot Project. The Project discovered that 99.9725% of eggs were SE-free. It was possible, therefore, for [the government] to test [Rose Acre's] eggs for the bacterium.

Id.

It is apparent from the foregoing, and from the trial court's repeated contextual references to Rose Acre's "healthy eggs,"[11] that the court's misgivings

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[11] *See, e.g., Rose Acre*, 55 Fed.Cl. at 656 ("[T]he regulations restricted millions of plaintiff's healthy eggs by prohibiting their sale in the table egg market." (emphasis in original)); *id.* at 657 ("This testimony established that plaintiff was forced to divert over 57.5 million dozens of its healthy eggs to the breaker egg market." (emphasis in original)); *id.* at 658 ("Much like the plaintiff in Yancey, who was forced to sell its breeder hens for slaughter, the restrictions in this case made plaintiff sell its healthy eggs to a much less profitable market." (emphasis in original)); *id.* at 659 ("Based on the facts, it is quite reasonable for plaintiff to have had an investment-backed expectation that

about the regulations are primarily based on its finding that a less-burdensome, alternative regulatory scheme—egg testing—was feasible. *See id.* at 662 ("[The government] never actually tested the eggs for SE, despite the fact that [egg] testing was feasible and would have been directed at the alleged source of the SE outbreaks"). The government vigorously disputes this proposition. It cites to the testimony of Dr. John Mason, director of the "SE Task Force" established by USDA in 1990 to respond to the SE-related public health emergency of the late 1980s, who noted that "although some people had already done work to show that SE could be found in eggs" by 1990, "eggs were not considered as a practical basis for testing," *Tr. Trans.* at 712, and "there hadn't been any experience with testing eggs as part of a regulatory effort." *Id.* at 759. Dr. Mason outlined the rationale underlying the regulations, as follows:

> It was, I think, considered that first testing the environment, to find out if it was an environment, was a pretty good indication that you

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its healthy eggs would not be restricted from sale as table eggs." (emphasis in original)); *id.* at 660 ("It is true that the public has a strong interest in eating safe food, however, the regulations at issue went too far in protecting this interest by prohibiting the sale of plaintiff's healthy eggs as table eggs." (emphasis in original)). According to the court, it emphasized "healthy" because Rose Acre only sought compensation for its "SE-free eggs," based on "approximations of how many eggs probably were SE infected." *Id.* at 656 n. 33. The court noted that "out of 20,000 eggs, the parties estimate that only one to fourteen are SE positive." *Id.* (citing the testimony of Dr. Eric Ebel, a USDA employee and former member of the USDA's "SE Task Force"). Notably, however, Dr. Ebel published the "SE Risk Assessment" study that includes this prevalence data in 1998—eight years after the interim regulations were imposed. *Tr. Trans.* at 329-35.

would find it in the birds. And if you tested in the birds and tested the tissues and it was found in the tissues, which this would [sic] imply there was a good chance it was getting into the ovaries and ovary ducts, and you could be pretty sure that at some point, it was going to get into the eggs.

Id. at 712. He described how USDA continued to investigate how best to discern the extent of SE contamination in eggs after the regulations were instituted, including testing the eggs of "three or four flocks that had been implicated in an outbreak" to determine whether USDA "could . . . culture eggs in a practical way and find SE in them." *Id.* at 759. In fact, USDA found that "in each case in flocks where the environment was positive and the birds were positive, [it] could also isolate [SE] from the eggs." *Id.* As the government observes, Dr. Mason's description makes clear that USDA learned *after* the regulations were issued that egg testing was feasible. Rose Acre's own expert, Dr. Patricia Curtis, Director of the Poultry Products Safety and Quality Peak of Excellence Program at Auburn University, agreed:

> Q Back in the 1990s, in the early 1990s, '90, '91, there wasn't a good test for eggs; is that true?
>
> [Dr. Curtis] Yes.
>
> Q In the early 1990s, it wasn't feasible to test a large number of eggs; is that true?
>
> [Dr. Curtis] Yes.
>
> Q It only became feasible to test eggs in the mid-1990s; isn't that correct?

> [Dr. Curtis] Somewhere along in there. I don't know the exact date, yes.
>
> Q Sometime after 1993, it became feasible to test eggs; is that right?
>
> [Dr. Curtis] Yes.

Id. at 550. Finally, the other research to which the trial court cited—testing in the United Kingdom and the government's "SE Pilot Project"—took place during and after the egg testing experiments Dr. Mason described.[12] Accordingly, the trial court clearly erred in finding that egg testing was feasible at the time the government imposed the restrictions at issue on Rose Acre.

Rose Acre correctly notes that the government does not contend that "some new technology was discovered between the time USDA promulgated the SE Regulations in 1990 and when it actually conducted egg testing for the first time in 1991." Therefore, it argues, the trial court's finding that "[i]t was possible . . . for [the government] to test [Rose Acre's] eggs for the bacterium" was not clearly erroneous. But the issue is not whether a less restrictive alternative to the government action existed or was "possible." It is whether there is a *nexus* between the regulation and its underlying public purpose. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) (noting that if the regulation at issue "utterly fails to further the end advanced as the justification," the "purpose then becomes the obtain-

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[12] The trial court noted, earlier in its opinion, that the SE Pilot Project was *established* in April 1992, which was just before the last of the restrictions at issue were lifted at Cort Acres and White Acres, and six months before they were lifted at Jen Acres. *Rose Acre*, 55 Fed.Cl. at 650 n. 8.

ing of an easement to serve some valid governmental purpose, but without payment of compensation").

Similarly, the trial court's finding that Rose Acre "shared a disproportionate amount of the burden of the SE regulations," even if correct, is not relevant. That the source of the contaminated eggs could not be determined in 70% of the reported SE outbreaks during the relevant period does not undermine the rationality of investigating identifiable sources. As the court noted, Rose Acre is one of the largest egg producers in the United States, *Rose Acre*, 55 Fed. Cl. at 647, and the three farms determined to have been sources of SE-illness related contamination[13] produced, according to Rose Acre's own laying rate and hen capacity figures, millions of eggs per day, *id.* at 647, 650-51 nn. 9, 11, and 12. Thus it is not surprising or significant that more than one-half (700 million) of the total (1.3 billion) eggs restricted pursuant to the regulations were Rose Acre's.

Rose Acre repeatedly emphasizes the end result of the regulatory scheme at issue—millions of its healthy eggs were restricted. However, this assertion itself relies on scientific understanding developed after the regulations were imposed (via the SE Pilot Project)[14] and lifted (as reported in the 1998 "SE Risk Assessment"). Nowhere does Rose Acre argue (or did it show) that the regulatory means were inconsistent with knowledge the government possessed at the time they were adopted or applied against Rose Acre. Nor

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[13] Rose Acre does not contest the validity of the three tracebacks to its farms.

[14] In addition to the data referenced in note 13, *supra*, the trial court cites to prevalence data developed in the Pilot Project. *See Rose Acre*, 55 Fed.Cl. at 650 n. 8.

does Rose Acre contend that there was no nexus between those means and the substantial public purpose underlying the regulations—protecting the public against exposure to a potentially serious, even fatal, food-borne illness. Accordingly, the trial court's conclusion that the "character of the governmental action" factor favors Rose Acre, whether treated as a question of fact subject to review only for clear error or a question of law considered de novo, cannot be sustained.[15]

D. Balancing of the *Penn Central* Factors

The *Penn Central* test was "designed to allow 'careful examination and weighing of all the relevant circumstances.'" *Tahoe-Sierra*, 535 U.S. at 322, 122 S.Ct. 1465 (quoting *Palazzolo*, 533 U.S. at 636, 121 S.Ct. 2448 (O'Connor, J., concurring)). Whether the regulations at issue in this case went too far and, therefore, constituted a taking, *Pa. Coal*, 260 U.S. at 415, 43 S.Ct. 158, is thus determined by balancing their interference with Rose Acres right to use its property in accordance with its reasonable economic expectations against the substantiality of the governments purpose and the nexus between that purpose and the means undertaken to achieve it. We

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[15] The government contends that the decision of the Seventh Circuit on Rose Acre's challenge to the validity of the regulations precludes further inquiry into the merits of the regulations, citing principles of collateral estoppel. We disagree. The issues before the Seventh Circuit concerned whether the government had the requisite authority to promulgate the regulations, and whether they were arbitrary and capricious so as to lack validity. *Rose Acre I*, 956 F.2d at 674-77. As discussed above, we deal here with the distinct issue of consideration of "whether the regulation[s] appropriately advance[d] a substantial government interest." *Tahoe-Sierra*, 535 U.S. at 323, 122 S.Ct. 1465.

leave that task to the trial court on remand, but note several considerations that should feature in the analysis.

First, as noted above, courts have traditionally rejected takings claims in the absence of severe economic deprivation. This hesitation stems from the very nature of a regulatory takings claim. Such a claim, lacking the "typically obvious and undisputed" predicate of a physical invasion or appropriation of private property by the government, is in essence, a claim that "a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation." *Tahoe-Sierra*, 535 U.S. at 322 n. 17, 122 S.Ct. 1465. In considering whether the economic deprivation here was of the requisite severity, the court should also consider the significance of the fact that the regulations restricted Rose Acres operations temporarily—for a period of about two years—after which Rose Acre returned to pre-restriction table egg sales levels.

Second, as of the time the restrictions were imposed, Rose Acre made 10 of its table egg sales within the state of Indiana, a fact noted but not further considered by the trial court. *Rose Acre*, 55 Fed.Cl. at 652. As noted above, state, not federal, officials were responsible for restricting intrastate sales. However, the trial court appears to have attributed the state-imposed restrictions to the federal government for purposes of the takings analysis. Such attribution is proper, however, only if the state officials were acting as agents of the federal government or pursuant to federal authority. *B G Enters., Ltd. v. United States*, 220 F.3d 1318, 1323-24 (Fed.Cir.2000). The regulations at issue provide no such authority, however, as they authorize limitations only on interstate move-

ment of eggs from test and infected houses. 55 Fed. Reg. 5584; 56 Fed.Reg. 3741.[16] Thus, unless a finding of agency or authority is otherwise appropriate, the trial court must consider only the actions of the federal government (and their effects) in evaluating Rose Acres takings claim.

Only when all of the relevant criteria and circumstances are considered, and considered together, can a conclusion be reached as to whether compensation is required in this case. On remand, then, the court must reevaluate the severity of the economic impact in accordance with the discussion above, and weigh that against the other Penn Central factors, taking into account all of the above-noted considerations.

II. Destroyed Hens: Categorical Takings Claim

The compensation the trial court awarded Rose Acre for the hens taken for necropsy represents a small portion ($15,671.99) of the total award. *Rose Acre*, 55 Fed.Cl. at 664. The government nonetheless also appeals that aspect of the trial court's judgment, arguing that (1) a categorical takings analysis is inapplicable and (2) the trial court's reliance on its finding that the "testing procedures were flawed" in its treatment of the "merits" of Rose Acre's claim as to its hens reveals that the court's erroneous finding in this regard contaminated its treatment of this claim, despite the court's invocation of the "categorical" label. The trial court correctly rejected the government's contention that a "per se" takings analysis is never applicable when personal property is at is-

[16] The regulations defined "[i]nterstate" as "[f]rom one State into or through any other State." 55 Fed.Reg. 5582; 56 Fed.Reg. 3739.

sue.[17] Whether Rose Acre's claim for compensation for its hens should be so resolved is not so clear, however.

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[17] In its opening brief, the government notes that the trial court "rejected the Government's demonstration that no categorical taking could be found in this instance because categorical takings are limited to the taking of real property." Government's Blue Brief, at 51 (citing *Rose Acre*, 55 Fed. Cl. at 661-62). When presented, recently, with the opportunity to so hold, however, the Supreme Court declined. *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003). Brown involved a claim that a state law requiring the deposit of certain client funds into "interest on lawyers' trust accounts" ("IOLTA") to fund the provision of legal services for the poor effected an uncompensated taking of the clients' property in violation of the Fifth Amendment. *Id.* at 228-29, 123 S.Ct. 1406. The U.S. Court of Appeals for the Ninth Circuit, sitting en banc, had held that "under the ad hoc approach applied in *Penn Central* . . . there was no taking because petitioners had suffered neither an actual loss nor an interference with any investment-backed expectations, and that the regulation of the use of their property was permissible." *Id.* at 231, 123 S.Ct. 1406. Four Ninth Circuit judges had dissented on the ground that "the majority's reliance on *Penn Central* was misplaced because this case involves a 'per se' taking rather than a regulatory taking." *Id.* The Supreme Court noted that no taking could be found upon application of *Penn Central* to the requirement that client funds be placed in an IOLTA account, noting that such placement involves merely a transfer of principal and thus "had no adverse economic impact on petitioners and did not interfere with any investment-backed expectation." *Id.* at 234. However, noting that the Ninth Circuit dissenters regarded the subsequent transfer of interest from the IOLTA account to the state fund administrators as akin to the "per se" taking that occurred in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), where the government had required landlords to allow television cable companies to install cable facilities on their buildings, the Supreme Court stated:

What is clear is that had the regulations required Rose Acre itself to kill and test the hens, no per se taking could be found. *See Seiber v. United States*, 364 F.3d 1356, 1370 (Fed.Cir.2004) (rejecting the applicability of per se treatment to a logging permit denial that entirely (albeit temporarily) destroyed the value of each affected tree even assuming each individual tree represents a separate property interest before cut from the land). The claimants in *Seiber* had invoked the holding in *Lucas* that a categorical taking results where a regulation prohibits all productive use of an entire parcel. *Id.* at 1368 (citing *Lucas*, 505 U.S. at 1015, 112 S.Ct. 2886). Setting aside (for purposes of decision) the issue of whether *Tahoe-Sierra* completely bars per se treatment for a temporary interference with property rights, we held that "the impact of an alleged taking must be considered in terms of the 'parcel as a whole,' whether analyzed by categorical or ad hoc standards." *Id.* (citing the holding in *Tahoe-Sierra*, 535 U.S. at 329-32, 122 S.Ct. 1465, "that the *Lucas* per se rule only applies in the 'extraordinary case' where three

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> We agree that a per se approach is more consistent with the reasoning in our . . . opinion [in *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998)] than Penn Centrals ad hoc analysis. As was made clear in Phillips, the interest earned in the IOLTA accounts "is the private property of the owner of the principal." If this is so, the transfer of the interest to the Foundation here seems more akin to the occupation of a small amount of rooftop space in Loretto.

Brown, 538 U.S. at 235, 123 S.Ct. 1406. Ultimately, though, the Court was not required to decide which "type of taking" was involved, *id.* at 233, 123 S.Ct. 1406, as it held that the IOLTA program's exclusion of client funds that could have produced net interest for their owners meant that no "just compensation" was due. *Id.* at 240, 123 S.Ct. 1406.

prerequisites are met: the regulation must (1) permanently deprive, (2) the *whole* property, (3) of all its value" (emphasis in original)). Accordingly, because the permit denial in *Seiber* did not affect "all of the timber on the two hundred-acre parcel," we rejected the claimants' categorical takings claim. *Id.* at 1370.

The question, then, is whether the mere fact that government officials carried out the testing (and the prerequisite seizure and destruction of the hens) is enough to transform what could otherwise qualify for takings compensation only if the *Penn Central* standard were met into a categorical taking. We think not. The Supreme Court has analyzed a takings claim that arose in an analogous context as a regulatory takings claim. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984). *Monsanto* concerned a federal statute that required pesticide manufacturers to register their products with the government prior to their sale in interstate or foreign commerce. *Id.* at 991, 104 S.Ct. 2862. Provisions of the statute authorized the Environmental Protection Agency ("EPA") to publicly disclose certain data submitted by registration applicants and, in some instances, to consider data submitted by one applicant in support of an application submitted by another party for registration of a similar chemical. *Id.* at 992-96, 104 S.Ct. 2862. Monsanto challenged these data-disclosure and data-consideration provisions on the ground that they effected a taking of those of its submitted trade secrets the government disclosed (or considered for the benefit of others) without just compensation. *Id.* at 998-99. Thus, as in the present case, the claim was that government officials, acting pursuant to one aspect of an integrated regulatory scheme enacted for the benefit of public health and safety, deprived the claimant of its interest in a por-

tion of its relevant personal property as a condition for permission to sell its product in interstate commerce. After recognizing that Monsanto's health, safety, and environmental data was cognizable as a property right under Missouri law, *id.* at 1003-04, the Court "confront[ed] the difficult question whether a 'taking' will occur when EPA discloses those data or considers the data in evaluating another application for registration" in accordance with the *Penn Central* analytical framework. *Id.* at 1004-14.

Here then, the same analysis must be employed to determine whether Rose Acre is entitled to compensation under the Fifth Amendment for its hens. The trial court, on remand, must evaluate the severity of the economic impact of the destroyed hens on Rose Acre in accordance with the standards and requirements discussed above in connection with its claim for compensation for the eggs affected by the regulations. Further inquiry into whether the regulations interfered with Rose Acre's reasonable investment-backed expectations and furthered a substantial public interest need not be undertaken in light of our above conclusions as to those issues, which apply with equal force to the claim for compensation for the hens. However, the court must ultimately weigh all the *Penn Central* factors, taking into account all the relevant circumstances, as noted above, to determine whether the Fifth Amendment requires compensation for the hens.

CONCLUSION

In accordance with the foregoing, we remand for reconsideration of the severity of the economic impact wrought by the relevant (i.e., federal) restrictions on Rose Acre, and for consideration of the significance of that impact in light of the other relevant factors,

namely the regulations' interference with Rose Acre's reasonable investment-backed expectations and their furtherance of the substantial government health and safety interest.

VACATED and REMANDED.

APPENDIX C

UNITED STATES COURT OF FEDERAL CLAIMS

No. 92-710C

ROSE ACRE FARMS, INC.,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

July 11, 2007

AMENDED OPINION & ORDER

FUTEY, *Judge*.

This regulatory takings case is before the court following a second trial on liability and damages. Plaintiff maintains that regulations enacted by the United States Department of Agriculture (USDA), which placed restrictions on chicken farms suspected of selling *salmonella*-infested eggs, caused a taking of plaintiff's healthy eggs at three of its farms. Plaintiff argues the restrictions had a severe economic impact on its operations, interfered with its investment-backed expectations, and were not in the public's best interests. Plaintiff asserts a general regulatory takings claim for its healthy eggs. Plaintiff seeks damages of more than six million dollars plus interest.

Defendant contends plaintiff failed to establish at trial that the regulations resulted in a taking of its

property. Defendant argues that the diversion of plaintiff's eggs caused plaintiff only minimal losses. In addition, defendant asserts the regulations were a proper use of the government's police power and were in the public's best interest.

On August 29, 2002, this court found in favor of plaintiff after a nine day trial, but the Federal Circuit reversed and remanded for a determination of the economic impact of the alleged taking on plaintiff. *See Rose Acre Farms, Inc. v. United States*, 53 Fed. Cl. 504, 524 (2002) (*Rose Acre I*), *superseded by* 55 Fed. Cl. 643 (2003) (*Rose Acre II*) *rev'd*, 373 F.3d 1177 (Fed.Cir.2004) (*Rose Acre III*). The Federal Circuit further instructed the court to weigh the private and public interests in this case in accordance with *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

Factual Background[1]

Plaintiff, Rose Acre Farms, Inc., is a business incorporated under the laws of the State of Indiana with its principal place of business in Seymour, Indiana. Defendant, the United States of America, is acting by and through its agent, USDA. The Animal Plant Health and Inspection Service (APHIS), a division of USDA, administered the regulations at issue. APHIS is responsible for preventing the spread of communicable diseases in poultry, to protect the livestock and poultry of the United States.

Plaintiff is primarily a producer of poultry eggs for sale throughout the central Midwest and Great Lakes

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[1] Only facts relevant to this opinion are summarized herein. The facts were discussed in greater detail in the court's opinion following the 2002 trial, *Rose Acre II*, 55 Fed. Cl. at 646-653.

regions. It sells mainly table eggs, which are raw eggs sold in their shell.[2] Plaintiff is one of the largest egg producers in the United States, with production facilities and farms in Indiana and Iowa. The three farms at issue in this case are located in Cortland, Indiana (Cort Acres), White County, Indiana (White Acres) and Jennings County, Indiana (Jen Acres).

In the late 1980's, the Centers for Disease Control (CDC) determined there was a growing problem with *Salmonella enteriditis* serotype *enteritidis* (SE) in chicken eggs.[3] SE outbreaks originally were limited to the northeastern region of the United States, but between April 9 and April 11, 1989 an SE outbreak occurred in Knoxville, Tennessee that was eventually traced back to plaintiff's Jen Acres farm. On February 16, 1990, in response to the increasing SE problem, APHIS, acting on behalf of the Secretary of Agriculture (Secretary), determined that emergency regulations were necessary to identify poultry flocks infected with SE and to prevent the spread of this disease. The Secretary therefore published interim regulations, effective immediately, that restricted the

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[2] Table eggs are different from breaker eggs, which are sold in liquid form for use in products that require pasteurization, such as cake mixes. Table eggs command a higher price for sale than breaker eggs.

[3] *Salmonella* is a gram negative rod-shaped microscopic bacterium that is ubiquitous. There are more than 2,000 serotypes (strains) of *salmonella*, and it is most commonly found in the intestinal tract of animals and birds. Persons can be exposed to *salmonella* in many ways, but the most likely exposure is through the consumption of raw or undercooked foods of animal origin, such as meat, poultry, milk or eggs. When a person becomes sick from consuming *salmonella*, the condition is referred to as salmonellosis. Symptoms in humans include nausea, vomiting, abdominal cramps, diarrhea, fever and headache. *See Rose Acre II*, 55 Fed. Cl. at 648 n. 5.

interstate sale of contaminated eggs and limited the interstate transportation of contaminated poultry. 9 C.F.R. §§ 82.30-82.36 (1991). The regulations were applied to "flocks" defined as "[a]ll of the poultry on one premises." 9 C.F.R. § 82.30. The regulations did not define "premises," but USDA initially explained that the terms "flock" and "premises" meant the entire farm or egg-producing facility.

The interim regulations also required the USDA to identify an egg-production flock as a "study flock" if "a Federal or State representative determines through epidemiologic investigation that the flock is the probable source of disease in an outbreak of disease in humans or poultry caused by [SE]." 9 C.F.R. § 82.32(a). Shipping records or other evidence had to substantiate that the probable source of the eggs was the producer's flock. *Id.* If USDA designated a flock to be a study flock, it then had to perform environmental testing for SE pursuant to the regulations.[4] If one or more of the environmental samples tested positive for SE, or if the entity in control of the study flock refused environmental testing, the interim regulations mandated that the study flock be designated a "test flock." 9 C.F.R. § 82.32(b). The owner of a test flock could not freely market the test flock's eggs or the test flock itself. The regulations limited the test flock eggs to uses that required pasteurization, and allowed the interstate sale or shipment of the eggs only after the owner obtained a permit and satisfied certain requirements. 9 C.F.R.

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[4] USDA believed, at the time, that any evidence of SE in the environment would indicate that the birds were infected, thus increasing the likelihood that they would lay SE-infected eggs. To the present date, the scientific community still does not fully understand all aspects of SE in eggs.

§ 82.33(a). The test flock eggs could not be transported interstate for use as table eggs.

After these regulations were put into effect, three separate outbreaks of SE contamination occurred in 1990 that were traced back to plaintiff's Cort Acres, White Acres and Jen Acres farms. The first incident happened on August 11, 1990, at a brunch wedding party in Versailles, Kentucky. Forty-two guests became ill when they ate eggs benedict with hollandaise sauce. The Kentucky Department for Health Services, in conjunction with APHIS, traced the source to eggs from plaintiff's Cort Acres facility.[5] USDA then declared all thirty-six houses at Cort Acres to be a study flock. USDA took separate environmental samples from the manure and egg conveyor belts at Cort Acres, and also obtained eighteen samples from each of the houses. Some of the houses tested positive in at least one environmental sample. Based on these results, USDA declared plaintiff's entire farm at Cort Acres to be a test flock. Plaintiff's interstate movement of the eggs from that facility was therefore restricted, and its sale of the eggs was limited to the pasteurization (a.k.a. breaker egg) market. USDA eventually applied the restrictions to only the specific houses at Cort Acres that tested positive. In response to USDA's testing, the Indiana State Board of Health notified plaintiff that it could no longer distribute, transport, or move the chickens, eggs and associated articles in intrastate commerce, except for pasteurization.[6]

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[5] In 1990, Cort Acres had thirty-six houses, which were configured into four quartiles with nine houses per quartile. Each house contained approximately 70,000 hens. Cort Acres' farm-wide capacity was 2.4 million hens.

[6] Cort Acres was suspected to be the source of an additional outbreak in Asheville, North Carolina on September 22, 1990.

A second SE outbreak occurred on September 30, 1990, at the Hyatt Regency hotel in Chicago, Illinois, where approximately 400 people became ill from SE-infected bread pudding at a True Value Hardware convention. The Chicago Health Department and the Illinois Department of Public Health jointly issued a report that traced the outbreak to eggs produced at plaintiff's White Acres farm.[7] USDA declared half of the twelve houses at White Acres to be a study flock based on this report. It then conducted environmental testing on the six houses, which came back positive. On November 27, 1990, USDA designated these six houses as a test flock, thus restricting the interstate movement of their eggs and limiting their use to pasteurization. USDA later conducted environmental testing at the remaining six houses. Some of these houses tested positive, so USDA identified the entire flock as an infected flock and imposed the applicable restrictions. On January 15, 1991, the Indiana State Egg Board imposed restrictions on plaintiff's intrastate sales of the White Acres eggs, determining that they could only be sold for pasteurization.

A third SE outbreak occurred on October 25, 1990, in Tennessee where seven people became ill when they consumed banana pudding with meringue. The Tennessee health authority determined that the suspect eggs originated from plaintiff's Jen Acres

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Since Cort Acres was already subject to investigation and restrictions, defendant did not notify plaintiff of this incident.

[7] In 1990, White Acres had twelve houses, each of which contained approximately 125,000 hens. White Acres' farm-wide capacity was 1.5 million hens.

facility.[8] USDA conducted environmental testing, which came back positive. It then restricted all of the Jen Acres flocks in January 1991, thus preventing the interstate movement of its eggs and limiting their sale to pasteurization markets. On February 6, 1991, USDA declared Jen Acres an infected flock. All of the houses at Jen Acres were subject to the restrictions. On January 17, 1991, the Indiana State Egg Board notified plaintiff that it was imposing restrictions on the intrastate movement of eggs from Jen Acres. Plaintiff was now only permitted to sell them in intrastate commerce for pasteurization.

In response to the SE quarantine at the three farms, plaintiff decided to build a breaker plant at Cort Acres in January 1991. Construction of said plant was completed in May 1991. The total cost of this project was approximately $6 million. Plaintiff built the facility to minimize its losses, when it was restricted to selling its eggs for pasteurization. Plaintiff also expanded its Pulaski County breaker plant to accommodate restricted eggs from White Acres.

After USDA imposed the restrictions on the movement of plaintiff's eggs, plaintiff had to depopulate, clean, disinfect and get reinspected by USDA at all layer houses in order to be allowed to sell its eggs on the table egg market again. In order to pass inspection, USDA required wet cleaning for each house, which was more expensive and time consuming than the traditional dry cleaning method. The wet cleaning damaged the electrical wiring in most of

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[8] In 1990, Jen Acres had twenty-two houses, twenty-one of which were in production. Each house had capacities ranging from 67,320 to 112,000 hens. Jen Acres' farm-wide capacity was 1.5 million hens.

plaintiff's houses, and in fact was related to a fire that partially burned down the inside of one of the houses. USDA's inspection after the wet cleaning was limited to a visual examination with a flashlight. It did not retest the environment or the hens. Sometimes the houses were empty for long periods of time as they awaited USDA inspection.

On May 8, 1992, USDA notified plaintiff that all remaining White Acres houses had been released from the SE restrictions. The Cort Acres facility was removed from the quarantine on July 16, 1992. Jen Acres received its reprieve on October 30, 1992. Thus, defendant applied the SE regulations to plaintiff for over twenty-one months. During the entire restriction period, defendant never tested any of plaintiff's eggs.

Prior to the enactment of the regulations, over 97% of the eggs plaintiff produced were sold as table eggs, and plaintiff had invested approximately $82.2 million in its table egg business. During the restricted period, plaintiff's primary business purpose continued to be the production of table eggs, although plaintiff was forced to divert millions of eggs to breaker plants.[9] After the quarantine ended in mid-1992, plaintiff immediately returned to selling over

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[9] A breaker plant separates an egg's liquid contents from its shell. The plant then pasteurizes (or heats) the contents to kill any bacteria within the egg. A USDA official must be present while the plant is in use. Before the restriction period, plaintiff only sent eggs of inferior quality to breaker plants. Less than three percent of its eggs met this criteria. Also, prior to the restriction period, plaintiff had one small breaker plant at its Pulaski County farm in northern Indiana. Most of plaintiff's breaker eggs, however, were sent to out-of-state breaker plants not owned by plaintiff.

97% of its eggs as table eggs. In addition, before and during the SE quarantine period, plaintiff primarily sold eggs in interstate commerce. Indeed, 90% of its eggs were sold in interstate commerce leaving 10% for sale in intrastate commerce.

In total, plaintiff diverted over 57.5 million dozens (nearly 700 million eggs) to breaker plants during the restricted period. Plaintiff sold 24,006,780 dozen restricted eggs to outside breaker plants. It also processed 33,753,843 dozen eggs in its own breaking plants, and sold the resulting liquid product to liquid-egg producers. The price plaintiff received for the breaker eggs was always less than what it would have made if it were selling table eggs.

Plaintiff filed a complaint in this court on October 13, 1992, requesting the following: (1) an amount equal to the value of the birds and eggs taken as a result of the restrictions; (2) the cost of compliance with the SE regulations; and (3) losses from a decrease in egg production. Plaintiff's claims are premised on the Fifth Amendment and 21 U.S.C. §§ 114a and 134a. Plaintiff initially sought $21,589,015.38 in damages, excluding interest. This amount includes compensation for: (1) restricted egg sales; (2) losses from layers taken for necropsy; (3) empty house losses from depopulation through inspection; (4) reduced production during restricted periods before required depopulation; (5) reduced production during unrestricted periods before required depopulation; (6) cleaning and disinfection costs; (7) purchase of table eggs to cover obligations; (8) storage costs for restricted eggs; (9) losses due to disruption of overall business; and (10) interest.

Defendant filed a motion to dismiss on January 3, 1995, arguing that plaintiff had failed to state a claim upon which relief may be granted and that the court lacked jurisdiction to hear plaintiff's claim based on sections 114a and 134a. The court dismissed plaintiff's claim under section 114a, but denied the remainder of defendant's motion in an unpublished decision issued August 7, 1995. The parties then engaged in extensive discovery. A trial was held in Washington, D.C. on April 30-May 10, 2002. In an opinion dated August 29, 2002, this court found in favor of plaintiff in part, and awarded it $6,165,297.72 plus simple interest for the lost egg sales and the taking of hens for necropsy. *Rose Acre I*, 53 Fed. Cl. at 524, *superseded by Rose Acre II*, 55 Fed. Cl. 643. This court subsequently awarded plaintiff attorneys' fees and expenses in the amount of $2,414,744.81. *Rose Acre II*, 55 Fed. Cl. at 670. Defendant appealed this decision and the Federal Circuit remanded the case to this court for reconsideration of the severity of the economic impact of the regulations on plaintiff and the "significance of that impact in light of" the *Penn Central* factors. *Rose Acre III*, 373 F.3d at 1198. This court held a two-day trial from November 30, 2006 to December 1, 2006, consisting almost entirely of expert testimony, to gather evidence on the Federal Circuit's questions.

Discussion

A regulatory taking does not involve a physical invasion or seizure of property. Instead, it concerns action that affects an owner's use of property, and is based on the general rule "that 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'" *767 Third Ave. Assocs. v. United States*, 48 F.3d 1575, 1580

(Fed.Cir.1995) (quoting *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922)). The government need not make use of, or take title in, the property at issue for a taking to occur because "[g]overnmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378, 65 S.Ct. 357, 89 L.Ed. 311 (1945)); *Aris Gloves, Inc. v. United States*, 190 Ct.Cl. 367, 420 F.2d 1386, 1391 (1970). Although the United States Supreme Court (Supreme Court) has found conclusively that such a regulatory taking does occur, it has not instituted a "set formula" for determining when governmental regulatory action becomes a compensable taking. *Penn. Central*, 438 U.S. at 124. Instead, because of the essentially factual nature of a takings claim, each claim is analyzed on an ad hoc, case-by-case basis. *Ruckelshaus*, 467 U.S. at 1005 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979)). The Supreme Court nevertheless has identified significant factors for consideration in these cases, including: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986) (quoting *Penn. Central*, 438 U.S. at 124). When one of these factors is so overwhelming as to decide conclusively the validity of a regulatory takings claim, that factor may

dispose of the claim altogether. *Ruckelshaus*, 467 U.S. at 1005.

A. Severity of Economic Impact

Historically, two different methods have been used to evaluate the severity of the economic impact of a regulatory taking, diminution in value and diminution in return.[10] *Compare Yancey v. United States*, 915 F.2d 1534 (Fed.Cir.1990) (finding a substantial loss where plaintiffs sold turkey flock for slaughter because temporary regulations prohibited transport of flock's eggs at a price significantly less than the flock's value as breeder turkeys) *with Cienega Gardens v. United States*, 331 F.3d 1319 (Fed.Cir.2003) (holding that a taking occurred where plaintiff suffered a 96% loss of return on its properties because legislation prohibited plaintiff from pre-paying mortgage and thereby forced plaintiff to continue running its properties as low-income housing). Although the Federal Circuit discussed the applicability of each of these methods to the case at hand, it remanded the case to this court to determine which method is more appropriate in light of the facts gathered at the two trials.

Plaintiff argues that the appropriate measure of severity is the diminution in return approach. Plaintiff's expert witness, Dr. Richard Just, testified that this is the correct way to look at the effect of the regulations in this case because "it was the destruction of profit that impacted Rose Acre as a busi

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[10] Diminution in value is sometimes referred to as "diminution in revenue" and diminution in return is interchangeable with "diminution in profit."

ness."[11] Dr. Just also stated that the diminution in value method is inappropriate because

> [w]hen you look at the impact on an ongoing business concern [like Rose Acre], it just doesn't make sense to look at only the value of an asset. It simply ignores costs. It ignores the profit margin. It ignores what is . . . of value to the producer, when you disrupt a business concern. . . .[12]

Dr. Just also contends that the diminution in value formulation is improper because it only measures the loss at a specific point in time instead of over the entire period of the regulation.[13] Defendant did not present any evidence on which method best demonstrates the effect of the regulations on plaintiff,[14] but instead asserts that, by any metric, the impact was not severe enough for plaintiff's loss to be considered a taking.

In *Yancey v. United States*, the plaintiffs purchased a flock of turkeys to use as breeders whose eggs they planned to sell in the national market. *Yancey*, 915 F.2d at 1536. Almost immediately after plaintiffs acquired the flock, the federal government imposed regulations quarantining plaintiff's flock because of an outbreak of avian influenza. *Id.* The cost of maintaining the flock was extremely high, therefore, plaintiffs "decided that keeping the flock alive for the indefinite duration of the quarantine would be un-

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[11] *Trial Transcript* (Tr.) at 1735-36.

[12] *Id.* at 1736.

[13] *Id.* at 1736.

[14] Defendant's witness, Dr. Bradley Reiff, testified that "both diminution in revenue and diminution in profit are appropriate measures that the Court could employ in this case." Tr. at 1929.

economical." *Id.* As a result, plaintiffs sold the flock for meat at a 77% loss. *Id.* By using the diminution in value approach, looking at the difference between how much plaintiffs bought the flock for and how much it sold it for, the court determined that plaintiffs had suffered a compensable taking. *Id.* at 1540.

Beyond the fact that both cases involve poultry, the case at hand and *Yancey* are not factually similar. While the *Yancey* plaintiffs' turkeys never produced eggs, and hence, profits, the three farms in this case had been continually turning in earnings for a number of years. The *Yancey* court's use of the diminution in value methodology is, therefore, inapplicable here.

After reviewing the Federal Circuit's decision in this case alongside the evidence presented at trial, then, the court agrees with plaintiff that diminution in return approach provides the best understanding of the regulations' impact on plaintiff. Dr. Just's testimony clearly demonstrated that using the diminution in return is appropriate "where, as here, the issue concerns the economic impact, albeit temporary, of government regulations on a going business concern." *Rose Acre III*, 373 F.3d at 1188-89.

The next issue, therefore, is how the court should calculate the diminution in return. Plaintiff argues, and Dr. Just testified, that plaintiff suffered a loss of $6,638,446.11 instead of making a $3,028,936.33 profit at the three farms effected by the regulations.[15] Therefore, plaintiff alleges that it sustained a 219.2% diminution in profit. These calculations reflect the loss and expected profit at the three farms less the

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[15] Plaintiff's Exhibit (PX) 800, Table 30.

ten percent of sales that occurred solely in intrastate commerce.[16] Plaintiff claims that because this loss of profits was so large, the regulations had a severe economic impact on the three farms.

Defendant contends that plaintiff's loss calculation is exaggerated and inappropriate to determine the severity of the economic impact of the regulations. Defendant argues that the following formula illustrates plaintiff's method of computing the diminution in profit:

"But For" Revenue-Actual Revenue

"But For" Revenue-Average Total Cost[17]

"But for" Revenue is the average price per dozen that plaintiff would have sold the eggs in question at absent the regulation whereas Actual Revenue is what plaintiff in fact sold them for on the breaker egg market. The Average Total Cost is equivalent to the cost per dozen eggs of operating the three farms and producing the eggs during the regulation period. Defendant represented that the "But For" Revenue per dozen eggs was 57.62¢, the Actual Revenue per dozen eggs was 51.52¢, and the Average Total Cost was 54.96¢ per dozen eggs. Thus, under plaintiff's formulation, the diminution in profit was

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[16] The Federal Circuit ruled that this "court must consider only the actions of the federal government (and their effects) in evaluating Rose Acres' takings claims." *Rose Acre III*, 373 F.3d at 1196. Therefore, plaintiff reduced its claimed losses and profits by ten percent because at the time the regulations were enacted, it sold ten percent of its eggs within the state of Indiana. *Id.* at 1195.

[17] Defendant's Exhibit (DX) 1037.

229.3%. Defendant claims that by using Average Total Cost, plaintiff overstates the losses it suffered. Instead, defendant avers that the court should look only at the Incremental Costs, costs attributable directly to the production of the eggs, excluding expenses generally associated with the operation of the farms. Defendant, therefore, offered this formula instead:

"But For" Revenue-Actual Revenue

"But For" Revenue-Incremental Cost[18]

Defendant maintains that the Incremental Cost of the eggs was 44.19¢, a number it arrived at by subtracting out the costs Rose Acre would have avoided if the three farms had ceased to produce eggs altogether during the regulation period. Defendant avers that this is the proper measure of costs because "[i]t's that parcel's contribution to costs and, therefore, that parcel's contribution to profit."[19] Defendant, therefore, claims that plaintiff only suffered a 45.4% diminution in return, which is not a severe enough economic impact to constitute a taking.

The Federal Circuit instructed this court to consider the severity of the economic impact of the regulations by considering the losses on all three farms as a whole. *Rose Acre III*, 373 F.3d at 1190. In fact, the Federal Circuit specifically noted that the use solely of incremental costs, as the government suggested during the original trial, the appeal, and the most recent trial, is inappropriate. *Id.* at 1189.

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[18] *Id.*

[19] Tr. at 1872.

The Federal Circuit specifically stated that determining plaintiff's profit by subtracting the incremental costs from the total revenue for all three farms "inaccurately prejudices the results." *Id.*

Moreover, defendant's method of determining the diminution in return simply does not reflect reality. In the real world, plaintiff chose to continue operating the farms using the only means available—selling the eggs on the breaker market, and even building a breaker facility on its premises. Defendant's calculations, however, are based on a hypothetical situation, what costs the plaintiff would have saved if it had shut all three farms down completely and Dr. Reiff's testimony regarding why using incremental costs was appropriate was simply not credible. If the court were to use defendant's method, it would essentially punish plaintiff for attempting to mitigate its damages. Although there is no specific duty to mitigate damages in a regulatory takings case like in contract law, the Federal Circuit implied in *Yancey* that the plaintiffs' attempt to alleviate the impact of the regulations by selling their flock for slaughter was an important factor in awarding compensation. *Yancey*, 915 F.2d at 1543 ("[The plaintiffs] properly mitigated their damages, by selling their flock when the poultry quarantine became overly burdensome. Nevertheless, the [plaintiffs'] business was wiped out through no fault of their own; just compensation is warranted in this case."). Therefore, because the Federal Circuit clearly indicated that this court should consider all three farms in their entirety and plaintiff took steps in the real world to find an economically viable way to continue its operations, there is no need to engage in defendant's hypothetical.

Using plaintiff's calculations, the diminution in return for the period of the regulations was 219.2%. It is clear, therefore, that plaintiff suffered a significant loss while the regulations were in effect. *See e.g. Cienega Gardens*, 331 F.3d at 1343 ("The loss of 96% of the possible rate of return on the investment is, even under the most conservative view, a 'serious financial loss.' "). The time period of the regulations, however, was "relatively brief," as the Federal Circuit noted. *Rose Acre III*, 373 F.3d at 1185. Although there is no bright line test of how long is long enough to effect a regulatory taking, the Federal Circuit has found a period of one year to be too short and a period of six years to be sufficiently long. *Compare Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1351-52 (Fed.Cir.2004) *with Cienega Gardens*, 331 F.3d at 1342-46. Obviously, the case at bar falls somewhere in between. Dr. Just testified that a 219.2% loss of profits is "equivalent to losing 100 percent of profits over 3 1/2 years. To me, that is a very substantial impact, and hard to imagine, how a business can survive, especially in—with thin profit margins as Rose Acre had."[20] This testimony was very credible and made it clear that the regulations restricted plaintiff's business long enough to have an extended and critical effect.[21] Therefore, because the regula-

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[20] Tr. at 1744.

[21] Dr. Just also testified to additional consequential damages plaintiff claims resulted from the regulations. Defendant argues that because consequential damages are not compensable, they should not be considered in determining the economic effect of the regulations. Evidence of other losses is arguably relevant under FRE 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"), but because

tions had a severe, albeit temporary, economic impact on plaintiff's business, the court finds that this factor weighs heavily in favor of the plaintiff.

B. Reasonable Investment-Backed Expectations

This court found, and the Federal Circuit agreed, that the second factor, that the regulations interfered with plaintiff's investment-backed expectations, favors the plaintiff. *See Rose Acre III*, 373 F.3d at 1190-91; *Rose Acre II*, 55 Fed. Cl. at 658-59. Therefore, there is no need to further address this factor.

C. Character of the Government's Action

The character factor requires the court to "consider the purpose and importance of the public interest reflected in the regulatory imposition." *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1176 (Fed.Cir.1994). A regulation that burdens private property may "constitute a 'taking' if [the burden is] not reasonably necessary to the effectuation of a substantial public purpose." *Penn Central*, 438 U.S. at 127. The fundamental purpose of the Takings Clause is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960). The regulations at issue can be examined under the lens of state nuisance law. "If the regulation prevents what would or legally could have been a nuisance, then no taking occurred. The state merely acted to protect the public under its inherent police powers." *Creppel v. United States*, 41 F.3d 627, 631 (Fed.Cir.1994).

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the court finds that the diminution in return alone demonstrates a severe economic impact, it need not consider the other losses.

The Federal Circuit found that this factor weighs in favor of defendant. Plaintiff, however, argues that a recent Supreme Court case, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005), affects the character inquiry to the extent that the Federal Circuit's analysis was improper. In *Lingle*, the Supreme Court stated that the "'substantially advances' formula suggests a means-ends test: It asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose." *Lingle*, 544 U.S. at 542 (emphasis in original). The Court went on to suggest that this is appropriate in due process cases, but not in takings cases because "[a] test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation." *Id.* at 543.

Although the Federal Circuit arguably used a means-ends test in determining that the character factor weighs in favor of defendant, *Lingle* does not necessarily invalidate the Federal Circuit's finding. In order to determine if *Lingle* affects the Federal Circuit's earlier determination, the court would limit its review to ascertaining whether *Rose Acre III* satisfies the legal analysis required by *Lingle*. *Hughes Aircraft Co. v. United States*, 140 F.3d 1470, 1474 (Fed.Cir.1998). Nonetheless, this court notes that its analysis of this factor after the 2002 trial was likely the correct approach under *Lingle*. This court, however, will not endeavor to resurrect its earlier conclusion that plaintiff "shared a disproportionate amount of the burden of the SE regulations," *Rose Acre II*, 55 Fed. Cl. at 660, because, under the "law of the case" doctrine, we must accept the Federal Circuit's find-

ing. Moreover, there is little indication that a new examination of this factor, taking *Lingle* into consideration, would alter the Federal Circuit's conclusion that the character of the government's action favors defendant. Therefore, this factor weighs in favor of defendant.

D. Balancing of the *Penn Central* Factors

The final step of the court's analysis is a weighing of the three *Penn Central* factors. As stated above, this court finds that the first two factors, severity of economic impact and reasonable investment-backed expectations, favor plaintiff while the final factor, character of the government's action, favors defendant. "When adverse economic impact and unanticipated deprivation of an investment backed interest are suffered . . . compensation under the Fifth Amendment is appropriate. Even when pursuing the public good . . . the Government does not operate in a vacuum. Bluntly stated, the consequences of the Government's action cannot be ignored." *Yancey*, 915 F.2d at 1542. On balance, plaintiff's severe economic loss and reasonable investment expectation outweigh government's attempt to prevent the spread of salmonella. Although government's interest in preventing the spread of disease is strong, the burden on plaintiff was so heavy that it is only equitable that the public should shoulder a portion of the weight. "If the intent of the [regulations] was to benefit the public, the public should be responsible for the [plaintiff's] losses." *Id.* Just as the *Yancey* court found, this court holds that, despite government's attempt to ensure the public's health and safety, a compensable taking occurred and plaintiff deserves just compensation.

E. Just Compensation and Interest

Plaintiff claims it is entitled to $6,638,446.11, based on Dr. Just's calculation, plus interest computed from the date of the taking to the date of payment. Although Dr. Just's calculations are credible and correct [nor were they disputed by the government], this court will reduce the amount, as it did after the 2002 trial, by $1,226,426.04, which plaintiff received as revenue from the sale of breeder eggs and started pullets. *Rose Acre II*, 55 Fed. Cl. at 665. Plaintiff is, therefore, entitled to $5,412,020.07 plus interest.

During opening statements, plaintiff alleged that compound interest is justified in this case, but abandoned this argument in its post trial briefs. Therefore, for the reasons stated in this court's previous decision, plaintiff is entitled to simple interest, calculated using the 52-week treasury bill rate. *Id.* at 665-66. Said simple interest began to accumulate on October 5, 1990, which was the date plaintiff's healthy eggs were first restricted.

F. Attorney Fees

The relevant component of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970(URA) states that "reasonable" attorney fees and expenses "actually incurred because of" this proceeding shall be reimbursed to plaintiff. 42 U .S.C. § 4654(c). Although plaintiff is accorded great leeway with respect to what constitutes a "reasonable fee," it can recover no fees or expenses that were not incurred "because of" the takings claim or those that were not "actually incurred." *See Hensley v. Eckerhart*, 461 U.S. 424, 440, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983); *Florida Rock Indus., Inc. v. United States*, 9 Cl.Ct. 285, 289 (1985).

Plaintiff requests attorney fees in the amount of $976,595.75. Defendant alleges that fees incurred as a result of preparing the writ of certiorari are not recoverable because certiorari was denied and thus does not affect the outcome of the present case. Additionally, because consequential damages are not recoverable, defendant objects to plaintiff recovering fees and expenses for preparing and trying this portion of their case. Finally, defendant claims that some work should not be reimbursed because it was unnecessarily duplicated. The court will consider each of these arguments.

1. Billing for Unsuccessful Claims

First, defendant objects to plaintiff's claims for attorney fees for services rendered in preparing plaintiff's petition for writ of certiorari to the Supreme Court, which total $160,544.64.[22] Because the Supreme Court denied Rose Acre's writ of certiorari, defendant maintains that plaintiff cannot recover the fees associated with its preparation. *See Hensley*, 461 U.S. at 434-36 (stating that fees are limited to those for the professional time that contributes to the ultimate success of the case.) Furthermore, defendant argues that if the court does award fees for the preparation of the certiorari petition, the work performed by Sommer duplicated the work done by Kirkland. Therefore, the amount of attorney fees requested should be reduced by $36,325.86 for the time Sommer's attorneys spent preparing the certiorari petition.

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[22] This amount includes $124,218.78 paid to Kirkland & Ellis (Kirkland) and $36,325.86 paid to Sommer Barnard PC (Sommer).

Plaintiff, however, claims that the certiorari-related fees were related to and incurred because of this proceeding. Plaintiff contends that the time and expense its counsel invested on preparing the certiorari was in pursuit of a successful takings claim on remand. Plaintiff also avers that any award should include $36,325.86 in fees and expenses incurred for Sommer's work in connection with the preparation and filing of the certiorari petition. Sommer's efforts, plaintiff maintains, were not duplicative of Kirkland's work, but that Sommer's attorneys provided background materials and knowledge that allowed the Kirkland lawyers to get up to speed more cost-effectively than if they had learned the case with no assistance.

Where "plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee." *Hensley*, 461 U.S. 424 at 440, 103 S.Ct. 1933, 76 L.Ed.2d 40. In other words, "plaintiff should not recover for time spent litigating issues as to which it did not prevail." *Florida Rock*, 9 Cl. Ct at 289.[23] If a litigation tactic or appeal contributed to the *ultimate* success of a case, however, the court can award attorney fees for that portion of the litigation even if a party was unsuccessful on that portion of the case. *Applegate v. United States*, 52 Fed. Cl. 751,

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[23] The court in *Florida Rock* did not have occasion to rule on the appropriateness of awarding attorney fees and expenses for an unsuccessful petition for rehearing because the plaintiff conceded that it should not be awarded any costs with respect to its petition for rehearing or petition for certiorari to the Supreme Court. *Florida Rock*, 23 Cl.Ct. 653, 657 (1991).

767 (2002) (citing *Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1053 (9th Cir.1991)).

Plaintiff failed to prove that the petition for certiorari contributed to its winning this case. The Supreme Court made no findings and did not add to the law of this case and the fact that plaintiff appealed the Federal Circuit's decision did not in any way alter the facts or law of this case. Plaintiff's requested award amount must, therefore, be reduced by $160,544.64 ($124,218.78 for Kirkland and $36,325.86 for Sommer) because plaintiff cannot recover for time spent litigating issues on which they did not prevail nor had any bearing on the final outcome.

2. Consequential Damages

Takings law does not allow compensation for consequential damages. Consequential damages include results that were remotely related to the government's action. As this court found after the 2002 trial, plaintiff's consequential damages are not recoverable. *See Rose Acre II*, 55 Fed. Cl. at 662-63 (citing *Yuba Natural Resources, Inc. v. United States*, 904 F.2d 1577, 1581 (Fed.Cir.1990) (citing *Kimball Laundry Co. v. United States*, 338 U.S. 1, 7, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949)); *see also United States v. General Motors Corp.*, 323 U.S. 373, 379, 65 S.Ct. 357, 89 L.Ed. 311 (1945); *Yancey*, 915 F.2d at 1542; *Georgia-Pacific Corp. v. United States*, 226 Ct.Cl. 95, 640 F.2d 328 (Ct.Cl.1980); *Foster v. United States*, 2 Cl.Ct. 426, 445 (1983)).

Defendant urges this Court to reduce the fee and expense award by at least ten percent as a result of plaintiff's pursuance of a claim for consequential damages. Defendant makes two arguments: 1) plain-

tiff advanced these claims considerably in its pretrial briefs and testimony and exhibits introduced at trial, but only referred to the consequential losses briefly in its post-trial briefs; and 2) consequential damages are not compensable and are not relevant to a determination of the fair value of what was actually taken. Defendant, therefore, maintains that any attorney fee award should be reduced by ten percent to reflect time spent analyzing consequential damages because plaintiff's billing record is not sufficiently detailed to depict exactly the portion of fees related to pursuing the consequential damages claim.

Furthermore, defendant petitions for a ten percent reduction in the reimbursement for expert fees paid to Dr. Just. Defendant avers that Dr. Just expended considerable effort arguing that consequential losses were a direct result of the regulation that should not be compensated. Defendant argues there is a sufficient amount of tables and charts in Dr. Just's report quantifying losses from empty houses, reduced production, disinfection costs, and other miscellaneous items for the court to make an inference that at least ten percent of Dr. Just's time was spent preparing the consequential damages argument. Dr. Just's fees were $90,975.00 and defendant requests that the fees, therefore, be reduced by $9,097.50.

Plaintiff alleges that arguing the consequential damages was necessary to demonstrate the severity of the economic impact of the regulations. Plaintiff further argues that the results are more important than the evidence the court chooses in arriving at its outcome.

"It is a well settled principle of Fifth Amendment taking law . . . that the measure of just compensation is the fair value of what was taken, and not the

consequential damages the owner suffers as a result of the taking." *Yuba Natural* Resources, 904 F.2d at 1581 (citing *Kimball Laundry Co.*, 338 U.S. at 7). "The government must pay only for what it takes, not for opportunities which the owner may have lost." *Georgia-Pacific Corp.*, 640 F.2d at 360 (citing *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 282, 63 S.Ct. 1047, 87 L.Ed. 1390 (1943)). Just as this court did in *Rose Acre II*, we will once again reduce plaintiff's attorney fees by ten percent to reflect the time spent on the consequential damages claim. *See Rose Acre II*, 55 Fed. Cl. at 669. The court also agrees with defendant that Dr. Just's fees should be offset by ten percent for the portion of his work related to consequential damages.

3. Duplicated Work

Defendant questions the number of Sommer attorneys present for the remand trial. Defendant maintains that it was not clear whether having four attorneys present on both days of a two-day trial to examine and cross-examine two witnesses was necessary. Defendant claims that only two attorneys were necessary for trial and requests that the court reduce the $25,445.00 bill by half and award $12,722.50.

Plaintiff maintains that the presence of attorneys Slaughter and Chambers at the trial was necessary for a number of reasons. First, these two attorneys attended the 2002 trial which plaintiff claims was necessary to provide historical continuity and helped during the pre-trial preparation as well as during the trial. In addition, Misters Slaughter and Chambers handled much of the post-trial work and plaintiff argues that it was, therefore, important for these attorneys to attend the two-day remand trial and observe the proceedings. Plaintiff avers it was more

cost-effective to have these attorneys observe the proceedings live rather than incur additional expenses that would otherwise have been added educating them on the case.

Plaintiff had no assurance of winning its trial on remand and because plaintiff bears the burden of proof this court understands that plaintiff need take greater steps in proving its case. Sometimes this includes hiring more attorneys. "The court is reluctant to second-guess counsel's time allocation for what has proved to be a winning case." *Florida Rock*, 9 Cl.Ct. at 288. Therefore, this court awards the full $25,445.00 to plaintiff to cover attorney fees for the remand trial.

G. Expenses

Plaintiff claims $49,135.80 in expenses. Defendant argues these expenses should be reduced by ten percent to reflect the consequential damages portion of the case discussed above. In addition, defendant contends that the URA was not meant to cover all expenses when the plaintiff is a large commercial entity fully capable of paying for counsel and unlikely to be deterred from bringing a claim. Rather, the URA was designed to ensure that private citizens do not have to shoulder the burden of a public program. This court, however, finds that the expenses would likely have been the same whether or not any time was spent on assessing consequential damages and a reduction is not warranted. Further, because defendant did not specifically list any other objections, this court will award plaintiff the full $49,135.80 to cover expenses.

Conclusion

For the above-stated reasons, the court hereby awards plaintiff $5,412,020.07 in damages, attorney fees in the amount of $734,446.00, expert fees in the amount of $81,877.50, and expenses in the amount of $49,135.80. In addition, plaintiff will receive $2,414,744.81 for attorney fees incurred during the 2002 trial. The Clerk is directed to enter judgment in favor of plaintiff in the amount of $5,412,020.07, plus simple interest at the 52-week treasury rate commencing from October 5, 1990 plus $3,280,204.11 in fees and expenses. Each side to pay its own court costs.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES COURT OF FEDERAL CLAIMS

No. 92-710C

ROSE ACRE FARMS, INC.,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

March 20, 2003

OPINION

FUTEY, *Judge.*

This regulatory takings case is before the court following a trial on liability and damages. Plaintiff maintains that regulations enacted by the United States Department of Agriculture (USDA), which placed restrictions on chicken farms suspected of selling *salmonella*-infested eggs, caused a taking of plaintiff's healthy eggs, hens, and hen houses at three of its farms. Plaintiff argues the restrictions had a severe economic impact on its operations, interfered with its investment-backed expectations, and were not in the public's best interests. Plaintiff asserts a general regulatory takings claim for its healthy eggs and hen houses, and a categorical takings claim for its hens that were destroyed for testing purposes. Plaintiff seeks damages totaling over $40 million, which includes a request for compound interest.

Defendant contends plaintiff failed to establish at trial that the regulations resulted in a taking of its property. Defendant argues that the diversion of plaintiff's eggs, the periods its houses were unused while they were cleaned and inspected, and the destruction of a small amount of its hens for testing, caused plaintiff only minimal losses. Defendant also believes plaintiff had no investment-backed expectations because the poultry industry is heavily regulated. In addition, defendant asserts the regulations were a proper use of the government's police power and were in the public's best interest. With respect to damages, defendant maintains plaintiff's expert lacked credibility for numerous reasons, and therefore, plaintiff is unable to prove that it is entitled to any damage award.

Factual Background

I. Plaintiff's Operations

Plaintiff, Rose Acre Farms, Inc., is a business incorporated under the laws of the State of Indiana with its principal place of business in Seymour, Indiana. Defendant, the United States of America, is acting by and through its agent, USDA. The Animal Plant Health and Inspection Service (APHIS), a division of USDA, administered the regulations at issue. APHIS is responsible for preventing the spread of communicable diseases in poultry, to protect the livestock and poultry of the United States.

Plaintiff is primarily a producer of poultry eggs for sale throughout the central Midwest and Great Lakes regions. It sells mainly table eggs, which are raw eggs sold in their shell.[1] Plaintiff is one of the largest

[1] Table eggs are different from breaker eggs, which are sold in liquid form for use in products that require pasteurization, such

egg producers in the United States, with production facilities and farms in Indiana and Iowa. The three farms at issue in this case are located in Cortland, Indiana (Cort Acres), White County, Indiana (White Acres) and Jennings County, Indiana (Jen Acres).

Each of plaintiff's farms has numerous hen houses of varying capacity. Plaintiff treats these houses as separate units, and such things as feed, labor, and "started pullets"[2] are allocated carefully among houses and farms. A disruption of one facility can have repercussions across the entire operation.

Plaintiff's production methods are quite detailed. It is a vertically integrated system, meaning that virtually all of the functions required for egg production occur on plaintiff's premises. This includes everything from purchasing breeder chicks to the laying, processing, storage and shipment of eggs. Specifically, plaintiff buys breeder chicks when they are one-day old and raises them for an eighteen-week period. At eighteen weeks, plaintiff moves the breeder chicks to a breeder layer farm with accompanying roosters. At this farm, plaintiff produces fertile eggs for the purpose of hatching. Plaintiff then transports the fertile eggs to its own hatcheries. In a twenty-one-day period, the eggs hatch to make day-old chicks. Plaintiff then takes the day-old chicks to its pullet-raising facility where they are kept for eighteen weeks. At eighteen weeks, the pullets are sexually mature, meaning they are capable of laying eggs.

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as cake mixes. Table eggs command a higher price for sale than breaker eggs.

[2] Started pullets are chicks who are older than one day. They are known as pullets until they sexually mature at approximately eighteen weeks.

Plaintiff then transports the pullets to layer farms, where they begin laying eggs. All of the laying hens in a particular house are approximately the same age. Layer hens peak in production at about twenty-eight weeks of age. After this time, their productivity declines on a regular basis until they reach the end of their productive life at seventy-five to seventy-eight weeks of age. During the productive cycle, they lay approximately 0.7 eggs per day. When the cycle has ended, the hens are removed and destroyed.[3] The house then receives a normal cleaning before new hens are introduced. Plaintiff is able to take advantage of associated economies of scale with this plan, and each farm can provide a consistent supply of table eggs for the appropriate regional market.

Since there are multiple steps involved in producing layer hens, plaintiff must plan for the placement of pullets in layer houses approximately eighteen months in advance. Indeed, much planning is involved in coordinating the timing of its depopulation and repopulation schedules for each house on its farms. Scheduling and timing, therefore, are key components of plaintiff's business. An interruption in plaintiff's scheduling system affects the entire organization, thus causing plaintiff to be unable to supply eggs to its customers.

Plaintiff's operations are also premised on an "in-line" facility. At an in-line farm, there is a grouping

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[3] The productive life of a layer hen can be extended by molting. This is a naturally occurring process that results from the reduction of light and feed to the bird. The hen's reproductive system rejuvenates during this process, thus allowing them to lay eggs until they are approximately 105 to 110 weeks of age. This process also improves both the interior and exterior quality of the eggs produced by the hens.

of layer houses for the purpose of producing eggs. The eggs laid in the houses are carried by a conveyor belt to the front of each house. A cross-conveyor belt then carries the eggs from a number of houses to a centrally located processing facility. At this facility, eggs are put through a series of machines; including a washer, dryer, candler, grader and packager; to clean, grade, sort and package the eggs for eventual sale.[4]

Each of plaintiff's layer farms includes a number of layer houses. For example, Cort Acres contains thirty-six separate houses. In 1990, all of plaintiff's layer houses were made of wood and had dirt floors with an outside shell of steel. These houses are two-story buildings, with the lower floor used to collect manure from the hens who are housed on the upper floor. Each layer house contains thousands of hens. For example, at Cort Acres each house contains approximately 70,000 hens. They are kept in rows of wired cages.

Plaintiff also operates feed mills at each of its layer farms, since feed for hens represents a very high percentage of plaintiff's total cost of producing eggs. Farmers deliver corn directly to plaintiff's farms, where it is stored in silos. Plaintiff mills the corn

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[4] Plaintiff's eggs are packaged in two types of containers: thirty-egg flats and twelve-egg cartons. The flats generally are used for eggs sold to institutional-type settings, such as restaurants, hotels and banquet halls, and to outside breaking plants. Cartons generally are used for eggs destined for grocery stores. The difference in packaging cost between cartons and flats is two cents a dozen. Once eggs are placed in containers, they are further packed into cases. Each case holds thirty dozen eggs. Plaintiff's cartons and cases are imprinted with an expiration date and packing plant identification number. Before 1990, plaintiff packaged approximately two-thirds of its eggs in cartons and one-third in flats.

with soybeans and other ingredients to produce a nutritious meal for the hens. Feed is conveyed to the hens through a series of augers. Water is also mechanically delivered to the hens.

II. The 1989 Traceback

In the late 1980's, the Centers for Disease Control (CDC) determined there was a growing problem with *Salmonella enteriditis* serotype *enteritidis* (SE) in chicken eggs.[5] Indeed, SE outbreaks originally were limited to the northeastern region of the United States. Between April 9 and April 11, 1989, however, an SE outbreak occurred in Knoxville, Tennessee. Federal and state officials performed a traceback to plaintiff's Jen Acre farm, which they believed to be the source of the SE. In May 1989, the Indiana State Poultry Association (ISPA) arranged with plaintiff's president, Lois Rust, to test Jen Acres for SE. Federal and state officials then performed environmental, blood and organ testing. Said testing revealed SE on an egg belt in House 7 and in an intestinal sample from a hen in House 8. Plaintiff stored the eggs from these houses in its holding cooler for approximately two weeks after the testing revealed the presence of SE. On June 1, 1989, Houses 7 and 8 were retested-the samples of which came out negative.

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[5] *Salmonella* is a gram negative rod-shaped microscopic bacterium that is ubiquitous. There are more than 2,000 serotypes (strains) of *salmonella*, and it is most commonly found in the intestinal tract of animals and birds. Persons can be exposed to *salmonella* in many ways, but the most likely exposure is through the consumption of raw or undercooked foods of animal origin, such as meat, poultry, milk or eggs. When a person becomes sick from consuming *salmonella*, the condition is referred to as salmonellosis. Symptoms in humans include nausea, vomiting, abdominal cramps, diarrhea, fever and headache.

After June 1, 1989, plaintiff received oral notification from ISPA that the houses, after subsequent testing, were SE-negative and were released from any restrictions or further testing. ISPA also informed plaintiff that it could do what it wished with the eggs from Houses 7 and 8. Plaintiff ultimately decided to sell the eggs as breaker eggs. On July 12, 1989, Houses 7 and 8 were retested. Again, the samples were negative.

III. USDA's *Salmonella* Regulations

A. *The interim regulations*

On February 16, 1990, in response to the increasing SE problem, APHIS, acting on behalf of the Secretary of Agriculture (Secretary), determined that emergency regulations were necessary to identify poultry flocks infected with SE and to prevent the spread of this disease. The Secretary therefore published interim regulations, effective immediately, that restricted the interstate sale of contaminated eggs and limited the interstate transportation of contaminated poultry. 9 C.F.R. §§ 82.30-82.36 (1991). USDA claimed that notice and public comment of the regulations could be waived because good cause existed, under 5 U.S.C. § 553 (1996), for immediate action to prevent harm to the industry and the general public. 55 Fed.Reg. 5580 (1990). The regulations were applied to "flocks" defined as "[a]ll of the poultry on one premises." 9 C.F.R. § 82.30. The regulations did not define "premises," but USDA initially explained that the terms "flock" and "premises" meant the entire farm or egg-producing facility.

The interim regulations also required the USDA to identify an egg-production flock as a "study flock" if "a Federal or State representative determines through

epidemiologic investigation that the flock is the probable source of disease in an outbreak of disease in humans or poultry caused by [SE]." 9 C.F.R. § 82.32(a). Shipping records or other evidence had to substantiate that the probable source of the eggs was the producer's flock. *Id.* If USDA designated a flock to be a study flock, it then had to perform environmental testing for SE pursuant to the regulations.[6] If one or more of the environmental samples tested positive for SE, or if the entity in control of the study flock refused environmental testing, the interim regulations mandated that the study flock be designated a "test flock." 9 C.F.R. § 82.32(b). The owner of a test flock could not freely market the test flock's eggs or the test flock itself. The regulations limited the test flock eggs to uses that required pasteurization, and allowed the interstate sale or shipment of the eggs only after the owner obtained a permit and satisfied certain requirements. 9 C.F.R. § 82.33(a). The test flock eggs could not be transported interstate for use as table eggs. Also, live hens could be moved interstate from a test flock if: (1) a permit had been obtained for interstate movement; (2) the chickens were moved interstate to a federally inspected slaughtering facility; and (3) the chickens were slaughtered within twenty-four hours of arriving at a federally inspected slaughtering facility. 55 Fed.Reg. 5584 (1990).

The regulations also required the test flocks to undergo blood and internal-organ testing. If the organs of one or more chickens from the test flock

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[6] USDA believed, at the time, that any evidence of SE in the environment would indicate that the birds were infected, thus increasing the likelihood that they would lay SE-infected eggs. To the present date, the scientific community still does not fully understand all aspects of SE in eggs.

tested positive for SE, the flock was designated as an "infected flock." The regulations imposed the same restrictions on interstate movement for infected flocks that they did for test flocks and their eggs. 9 C.F.R. §§ 82.32(c)(2), 82.33(a). Essentially, all hens, eggs, manure, cages, coops, containers, troughs and other equipment were quarantined and could not leave the house except "under seal." A flock kept its designation as an infected flock until defendant retested it and no internal organ received a positive result. Before USDA retested and released a test flock or infected flock from the applicable restrictions, the owner had to purchase special equipment and disinfection chemicals and implement specific disinfection procedures.

In March 1990, after the interim regulations went into effect, defendant established the SE Task Force in Hyattsville, Maryland. Thirty to forty people, mostly USDA veterinarians, were brought in from the field to work with SE and its effects.

B. *The final regulations*

USDA published final SE regulations on January 30, 1991, 56 Fed.Reg. 3730 (1991) (codified at 9 C.F.R. § 82.30-82.38), following the receipt of comments from interested parties. These regulations incorporated most of the provisions of the interim regulations and added several additional provisions. For example, they used the term "house" to describe the components of the flock to prevent the transmission of SE to the other houses. The restrictions were therefore imposed on separate poultry houses when the specific requirements were met.

The final regulations also required retesting for additional reasons. If there was an infected house on

the premises, for example, any other test house that had been released from test-house status because of two negative organ tests had to undergo a third blood and organ test within forty-five to sixty days following its release from test-house status. Also, if one house on the premises was infected, all other houses on the premises, except for test and former test houses, had to undergo environmental testing until 120 days after the date the last infected house had its infected status removed. In addition, if an infected house was released from infected-house status, it had to be retested within forty-five to sixty days following its release. An infected house was released only after it was either depopulated, cleaned, washed, and disinfected, or internal organ samples tested negative. USDA inspected the premises to confirm that these procedures were properly performed. 9 C.F.R. §§ 82.32(e), 82.37.

USDA amended the final regulations in 1992 to alter the retesting procedures. 57 Fed.Reg. 776 (1992). These amendments allowed the flocks to be released from test or infected status if they were depopulated and their houses were cleaned, washed and disinfected. 57 Fed.Reg. 777. Also, the administrator of APHIS was given the authority to periodically retest a flock for eighteen months following its release from test or infected status, or after it was repopulated.

Pursuant to the regulations, APHIS administered USDA's SE traceback program until mid-1995. The traceback procedure involved investigating an outbreak of SE and determining the source of the eggs causing the incident. After an outbreak was reported, it took state and local health departments an average of two to three months to make official reports. By then it was difficult to carry out an

effective egg trace. Indeed, the eggs containing the highest risk for humans usually had already been distributed and consumed.

As of 1996, there were approximately 1,000 large flocks with SE in the United States. Nevertheless, USDA restricted only thirty-eight flocks between 1990 and 1994. In total, over 1.3 billion eggs were diverted pursuant to the regulations.[7] Restricted eggs from plaintiff represented more than one-half of this total.[8]

IV. *Salmonella* Outbreaks Related To Plaintiff

A. *Tracebacks*

Three separate outbreaks of SE contamination occurred in 1990 that were traced back to plaintiff's Cort Acres, White Acres and Jen Acres farms. The first incident happened on August 11, 1990, at a brunch wedding party in Versailles, Kentucky. Forty-two guests became ill when they ate eggs benedict with hollandaise sauce. The Kentucky Department for Health Services, in conjunction with APHIS, traced the source to eggs from plaintiff's Cort Acres

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[7] Defendant's witness, Dr. John Mason, testified that of the 1.3 billion diverted eggs, approximately 0.3 percent were SE positive. Trial Transcript (Tr.) at 802.

[8] The court notes that in November 1991, defendant formed a subcommittee of the SE Working Group to organize the SE Pilot Project in Pennsylvania. The Pennsylvania Pilot Project was established in Lancaster, Pennsylvania in April 1992. Its stated objectives were to develop effective and efficient monitoring for SE infection in layer flocks, with the ultimate goal of preventing SE from contaminating eggs. The Project investigated the prevalence of SE in eggs by testing their internal contents. It determined that in 10,000 eggs taken from an environmentally SE-positive house, only 2.75 would contain SE.

facility.[9] USDA then declared all thirty-six houses at Cort Acres to be a study flock. USDA took environmental samples from the manure and egg conveyor belts at Cort Acres, and also obtained eighteen samples from each of the houses. Some of the houses tested positive in at least one environmental sample. Based on these results, USDA declared plaintiff's entire farm at Cort Acres to be a test flock. Plaintiff's interstate movement of the eggs from that facility was therefore restricted, and its sale of the eggs was limited to the pasteurization market. USDA eventually applied the restrictions to only the specific houses at Cort Acres that tested positive. In response to USDA's testing, the Indiana State Board of Health notified plaintiff that it could no longer distribute, transport, or move the chickens, eggs and associated articles in intrastate commerce, except for pasteurization.[10]

A second SE outbreak occurred on September 30, 1990, at the Hyatt Regency hotel in Chicago, Illinois, where approximately 400 people became ill from SE-infected bread pudding at a True Value Hardware convention. The Chicago Health Department and the Illinois Department of Public Health jointly issued a report that traced the outbreak to eggs produced at plaintiff's White Acres farm.[11] USDA declared half of

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[9] In 1990, Cort Acres had thirty-six houses, which were configured into four quartiles with nine houses per quartile. Each house contained approximately 70,000 hens. Cort Acres' farm-wide capacity was 2.4 million hens.

[10] Cort Acres was suspected to be the source of an additional outbreak in Asheville, North Carolina on September 22, 1990. Since Cort Acres was already subject to investigation and restrictions, defendant did not notify plaintiff of this incident.

[11] In 1990, White Acres had twelve houses, each of which contained approximately 125,000 hens. White Acres' farm-wide capacity was 1.5 million hens.

the twelve houses at White Acres to be a study flock based on this report. It then conducted environmental testing on the six houses, which came back positive. On November 27, 1990, USDA designated these six houses as a test flock, thus restricting the interstate movement of their eggs and limiting their use to pasteurization. USDA later conducted environmental testing at the remaining six houses. Some of these houses tested positive, so USDA identified the entire flock as an infected flock and imposed the applicable restrictions. On January 15, 1991, the Indiana State Egg Board imposed restrictions on plaintiff's intrastate sales of the White Acres eggs, determining that they could only be sold for pasteurization.

A third SE outbreak occurred on October 25, 1990, in Tennessee where seven people became ill when they consumed banana pudding with meringue. The Tennessee health authority determined that the suspect eggs originated from plaintiff's Jen Acres facility.[12] USDA conducted environmental testing, which came back positive. It then restricted all of the Jen Acres flocks in January 1991, thus preventing the interstate movement of its eggs and limiting their sale to pasteurization markets. On February 6, 1991, USDA declared Jen Acres an infected flock. All of the houses at Jen Acres were subject to the restrictions. On January 17, 1991, the Indiana State Egg Board notified plaintiff that it was imposing restrictions on the intrastate movement of eggs from Jen Acres.

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[12] In 1990, Jen Acres had twenty-two houses, twenty-one of which were in production. Each house had capacities ranging from 67,320 to 112,000 hens. Jen Acres' farm-wide capacity was 1.5 million hens.

Plaintiff was now only permitted to sell them in intrastate commerce for pasteurization.

B. *Plaintiff's response to the outbreaks*

In addition, after houses were labeled test flocks at the three farms, hens at these facilities were tested for the presence of SE. USDA physically removed them from the houses, killed them, and then transported the carcasses to a USDA laboratory in Ames, Iowa. Once USDA labeled a house "infected," one option for getting the house released was to re-test hens and have them pass two consecutive organ tests. Plaintiff tried this option, but in most cases was unsuccessful. A total of 6,741 hens were removed from plaintiff's houses for necropsy, a procedure similar to an autopsy that tested for SE. Only 147 of them (approximately 2.18%) tested positive.

Moreover, plaintiff had to depopulate, clean, disinfect and get reinspected by USDA at all layer houses in order to be released from the restrictions. USDA required wet cleaning for each house, which was more expensive and time consuming than the traditional dry cleaning method. The wet cleaning damaged the electrical wiring in most of plaintiff's houses, and in fact was related to a fire that partially burned down the inside of one of the houses. USDA's inspection after the wet cleaning was limited to a visual examination with a flashlight. It did not retest the environment or the hens. Sometimes the houses were empty for long periods of time as they awaited USDA inspection.

On May 8, 1992, USDA notified plaintiff that all remaining White Acres houses had been released from the SE restrictions. The Cort Acres facility was removed from the quarantine on July 16, 1992. Jen

Acres received its reprieve on October 30, 1992. Thus, defendant applied the SE regulations to plaintiff for over twenty-one months. During the entire restriction period, defendant never tested any of plaintiff's eggs.

V. Effect Of The Restrictions On Plaintiff's Operations

Prior to the enactment of the regulations, over 97% of the eggs plaintiff produced were sold as table eggs, and plaintiff had invested approximately $82.2 million in its table egg business. During the restricted period, plaintiff's primary business purpose continued to be the production of table eggs, although plaintiff was forced to divert millions of eggs to breaker plants.[13] After the quarantine ended in mid-1992, plaintiff immediately returned to selling over 97% of its eggs as table eggs. In addition, before and during the SE quarantine period, plaintiff primarily sold eggs in interstate commerce. Indeed, 90% of its eggs were sold in interstate commerce leaving 10% for sale in intrastate commerce.

Also, in response to the SE quarantine, plaintiff decided to build a breaker plant at Cort Acres in January 1991. Construction of said plant was completed in May 1991. The total cost of this project was approximately $6 million. Plaintiff built the facility to minimize its losses, when it was restricted to selling

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[13] A breaker plant separates an egg's liquid contents from its shell. The plant then pasteurizes (or heats) the contents to kill any bacteria within the egg. A USDA official must be present while the plant is in use. Before the restriction period, plaintiff only sent eggs of inferior quality to breaker plants. Less than three percent of its eggs met this criteria. Also, prior to the restriction period, plaintiff had one small breaker plant at its Pulaski County farm in northern Indiana. Most of plaintiff's breaker eggs, however, were sent to out-of-state breaker plants not owned by plaintiff.

its eggs for pasteurization. Plaintiff also expanded its Pulaski County breaker plant to accommodate restricted eggs from White Acres.

In total, plaintiff diverted over 57.5 million dozens (nearly 700 million eggs) to breaker plants during the restricted period. Plaintiff sold 24,006,780 dozen restricted eggs to outside breaker plants. It also processed 33,753,843 dozen eggs in its own breaking plants, and sold the resulting liquid product to liquid-egg producers. The price plaintiff received for the breaker eggs was always less than what it would have made if it were selling table eggs. Indeed, the average cost for plaintiff to produce a dozen eggs during the period of restriction was 54.96 cents. Plaintiff received, however, only 41.46 cents per dozen for eggs sold to outside breaking plants, and 46.64 cents per dozen for eggs processed in plaintiff's own breaking facilities. The average price of table eggs during the restrictions was 59 cents per dozen. Furthermore, plaintiff had to purchase table eggs from its competitors to cover some of its contractual obligations to its customers. Plaintiff also had to store some of its eggs in a commercial facility until it could identify a liquid egg market to absorb them.

Moreover, started pullets that plaintiff had slated for unrestricted houses had to be used to repopulate the restricted houses. Also, pullets in the unrestricted houses had to be molted or left in production beyond normal production cycles, resulting in a decline in production in unrestricted houses. This upset the scheduling and timing of plaintiff's routine operations.

VI. Plaintiff's Challenges To The Regulations

Plaintiff disagreed with the restrictions defendant imposed on its farms, and thus, decided to challenge

the SE regulations. On December 28, 1990, plaintiff filed a complaint in the United States District Court for the Southern District of Indiana (District Court) seeking declaratory relief stating that the interim regulations were invalid. Plaintiff amended its complaint on February 18, 1991, to seek declaratory relief finding the interim and final regulations invalid because: (1) they both deprived plaintiff of due process; (2) the interim regulations were not promulgated in accordance with the Administrative Procedure Act; (3) both sets of regulations exceeded the USDA's statutory authority; (4) the final regulation could not be applied retroactively; and (5) both sets of regulations unlawfully delegated authority to state officials.[14] Plaintiff later amended its complaint again to include claims that: (1) the application of certain monitoring provisions was invalid and (2) it was entitled to compensation for eggs diverted to pasteurization facilities, hard boiling, or export.[15] The District Court ruled against plaintiff, finding that: (1) defendant had the authority to promulgate the interim and final regulations; (2) the application of the regulations did not deprive plaintiff of due process; and (3) the regulations were not arbitrary or capricious.[16] The District Court, however, did find the monitoring provision to be arbitrary and capricious, and concluded that the SE regulations, as a whole, were invalid because they explicitly contemplated no mechanism for compensating restricted eggs or for chickens executed for testing purposes.

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[14] Defendant's Motion In Limine (Def.'s Mot.), Appendix (App.) at 13-17 (District Court Complaint).

[15] *Id.*, App. at 19-21, 26 (Amendment to District Court Complaint).

[16] *Id.*, App. at 61 (Judgment of District Court).

Both parties appealed to the United States Court of Appeals for the Seventh Circuit (Seventh Circuit), who reversed the District Court's order invalidating the SE regulations. *Rose Acre Farms, Inc. v. Madigan*, 956 F.2d 670, 672-74 (7th Cir.1992). The Seventh Circuit held that plaintiff must instead seek compensation under the Fifth Amendment or 21 U.S.C. §§ 114a and 134a (1999) in the United States Court of Federal Claims. The Seventh Circuit also determined that the regulations were made within the authority of the Secretary and that they were neither arbitrary nor capricious. *Id.* at 675-677.

Plaintiff then filed a complaint in this court on October 13, 1992, requesting the following: (1) an amount equal to the value of the birds and eggs taken as a result of the restrictions; (2) the cost of compliance with the SE regulations; and (3) losses from a decrease in egg production. Plaintiff's claims are premised on the Fifth Amendment and 21 U.S.C. §§ 114a and 134a. Plaintiff seeks $21,589,015.38[17] in damages, excluding interest. This amount includes compensation for: (1) restricted egg sales; (2) losses from layers taken for necropsy; (3) empty house losses from depopulation through inspection; (4) reduced production during restricted periods before required depopulation; (5) reduced production during unrestricted periods before required depopulation; (6) cleaning and disinfection costs; (7) purchase of table eggs to cover obligations; (8) storage costs for

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[17] Plaintiff has amended the amount of its damages request numerous times. This figure represents the costs plaintiff set forth at trial and in its post-trial briefing. In addition, plaintiff actually requests a total of $21,589,015.85. The court's calculation of plaintiff's listed expenses, however, results in a total of 38 cents, not 85 cents.

restricted eggs; (9) losses due to disruption of overall business; and (10) interest.

Defendant filed a motion to dismiss on January 3, 1995, arguing that plaintiff had failed to state a claim upon which relief may be granted and that the court lacked jurisdiction to hear plaintiff's claim based on sections 114a and 134a. The court dismissed plaintiff's claim under section 114a, but denied the remainder of defendant's motion in an unpublished decision issued August 7, 1995. The parties then engaged in extensive discovery. Following the pre-trial conference conducted on October 10, 2001, defendant filed a motion in limine arguing that plaintiff was precluded from challenging the regulations. The motion also contested plaintiff's request for consequential damages. On March 19, 2002, the court denied this motion without prejudice, choosing instead to address it in the court's post-trial opinion. Indeed, these arguments are considered below. A trial was held in Washington, D.C. on April 30-May 10, 2002. Post-trial briefing was completed on July 1, 2002.

Discussion

Plaintiff asserts the taking of three items during the period of restriction, its healthy eggs, hen houses and hens. Plaintiff raises a general regulatory takings claim for its eggs and houses, and a categorical taking of its hens. It also cites relief under 21 U.S.C. § 134a, although it does not specify any particular claims pursuant to this statute. Plaintiff seeks just compensation for these items and various related costs. Defendant maintains that plaintiff is unable to establish the elements of a regulatory and categorical takings claim, thus precluding any just compensation. Defendant also adds that many of

plaintiff's theories are attempts to recover consequential damages, which takings law does not allow.

I. Preliminary Issues

Before addressing the specifics of the parties' takings arguments, it is important to comment on two underlying issues: (1) plaintiff's actions in the "but-for" world, and (2) the methodology implemented by the regulations. The effectiveness of safe-handling instructions is also a key point. The court's findings on these issues are necessary to fully analyze the elements of regulatory takings.

A. *The "but-for" world*

A "but-for" world is a hypothetical scenario predicting what would have happened if some outcome determinative factor had not occurred. In the present case, the parties dispute the nature of plaintiff's reaction to the SE tracebacks if defendant had never enacted the regulations. Defendant maintains that plaintiff would have acted the same in this but-for world. It asserts that plaintiff would have used the same house cleaning procedures and diversion method for its eggs. Defendant also argues that adverse publicity and the threat of private lawsuits would have persuaded plaintiff to follow these procedures. Defendant emphasizes plaintiff's response to the 1989 traceback to support its claim.

Plaintiff contends defendant's but-for world is flawed because plaintiff did not voluntarily test and restrict its eggs during the 1989 traceback. Plaintiff also claims that adverse publicity and products liability lawsuits would not have affected its reaction to the SE tracebacks. Plaintiff adds that the purpose of the regulations was to change behavior. It questions

the point of having the regulations if its response would have been the same.

After careful consideration of the parties' evidence, the court concludes that plaintiff's response to the outbreaks would have differed if there were no regulations. Plaintiff presented persuasive evidence at trial that it would not have undergone the same cleaning and disinfecting procedures for its houses if there were no regulations. The costs of these procedures were quite expensive, and the regulations required plaintiff to "wet clean," which is costly and destructive. Indeed, this procedure damaged the electrical wiring in the houses, thus requiring new wires to be installed. As Victor Rigterink, plaintiff's executive vice president, testified, "Imposition of water into a house which is wood certainly doesn't do any good. It also ruined the electrical system in almost every house. We had to rewire almost all of the houses after it was wet-cleaned. In fact, one of them partially burnt down on the inside."[18] Plaintiff never used wet cleaning before the government ordered the procedure per the regulations.

Plaintiff also made clear that it would not have diverted its eggs to the breaker market after the 1989 traceback if the government had not required such an action. Plaintiff offered testimony at trial that defendant threatened to "mess with its markets" if it did not follow procedures and divert its eggs in 1989.[19] Plaintiff's employees emphasized that there was nothing voluntary about restricting their eggs. For example, plaintiff's president, Lois Rust, stated "I felt that we were forced into agreeing to this . . . . He

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[18] Tr. at 200.

[19] *Id.* at 975.

said that either do it or else."[20] Mr. Rigterink added "we felt seriously coerced to do so."[21] In fact, defendant's witness, Dr. Paul Aho, who claimed that plaintiff voluntarily diverted its eggs during the 1989 traceback, admitted that he had no personal knowledge of any egg producer who diverted eggs voluntarily as the result of a traceback.[22] Defendant's argument that plaintiff would have voluntarily diverted its eggs after the three subsequent tracebacks, regardless of whether there were regulations in place, is unpersuasive.

Moreover, plaintiff proffered evidence that the adverse publicity to the tracebacks was irrelevant in terms of its conduct. After the 1989 traceback, plaintiff briefly changed its name on its cartons to a different house brand to avoid any stigma attached to the title "Rose Acre."[23] This change only lasted for a few weeks, however, because plaintiff received multiple phone calls from wholesalers asking that it return to the Rose Acre brand.[24] The familiarity of the Rose Acre name was very important to plaintiff's customers.

Also, the threat of private lawsuits is not convincing evidence that plaintiff would have diverted its eggs and implemented wet cleaning if there were no regulations in place. Indeed, plaintiff still encountered litigation when it was subject to the regulation-imposed restrictions. Plaintiff simply turned these claims over to its insurance carrier, and had little

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[20] *Id.* at 75-76.

[21] *Id.* at 261.

[22] *Id.* at 1366.

[23] *Id.* at 252.

[24] *Id.* at 251-52.

involvement with them.[25] It presumably would have reacted the same way in the but-for world. There is no reason to believe that the threat of lawsuits would have persuaded plaintiff to apply different cleaning procedures, or divert its eggs to the breaker market.

B. *Comments on the regulations*

The Seventh Circuit has already determined the constitutionality of the regulations, nevertheless, the issue still remains on whether they caused a taking of plaintiff's property. USDA believed at the time of the tracebacks that if the hens' environment contained SE, they too carried the disease.[26] It therefore concluded that the hens would lay eggs that were infected.[27] The regulations' requirements were based predominantly on this belief. Indeed, when SE was traced back to a particular house, defendant ordered testing of its hens and environment. Defendant never sought to have the eggs tested, despite the fact that they were the alleged sources of the SE outbreaks. If either the hens or the environment tested positive for SE, the regulations imposed a strict ban on table egg sales in interstate commerce. Plaintiff then had the option of retesting the hens on two subsequent occasions or depopulating, cleaning, disinfecting and then repopulating the houses. Plaintiff generally chose the latter, and spent much time wet cleaning and disinfecting the houses and repopulating with new hens. After plaintiff completed the cleaning, defendant never retested the environment or hens. Its inspection consisted of a simple walk through of the

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[25] *Id.* at 251.

[26] *Id.* at 704-05.

[27] *Id.*

houses with a flashlight. Again, the eggs themselves were never tested.

The court believes that such requirements were misguided, at best. The parties made clear at trial that SE exists everywhere in our world, and it is impossible to eradicate.[28] The fact that SE was found in plaintiff's houses, therefore, does not indicate that the eggs were infected too. Also, the fact that SE was found in the hens does not necessarily implicate their eggs as well. The phenomenon of intermittent shedding proves that the hens' eggs could very well be SE-free.[29] Regardless, testing of plaintiff's hens resulted in a very low prevalence of SE-positives.

Moreover, defendant was aware in the late 1980's that SE could exist inside an egg. In addition, the scientific technology for testing the inside of eggs existed at the time the regulations were enacted. Such testing was used in the United Kingdom and during defendant's Pennsylvania Pilot Project.[30] The Project discovered that 99.9725% of eggs were SE-free. It was possible, therefore, for defendant to test plaintiff's eggs for the bacterium. The court considers defendant's decision to test the hens and the environment, and then to follow up said tests with a simple walk-through of the houses with a flashlight, to be a careless method of preventing the further exposure of SE to consumers.

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[28] *Id.* at 993; Joint Exhibit (Jt.Ex.) 3.

[29] "Intermittent shedding" is a theory explaining how an egg formed in the reproductive tract of a hen may or may not acquire an SE bacterium while it is developing. Tr. at 483. Indeed, a hen with SE may never lay an infected egg. Tr. at 484.

[30] Tr. at 758-60, 1077.

C. *Safe-handling instructions*

The safe handling of an SE-infected egg eliminates the bacterium before consumption. Safe handling involves such things as thoroughly cooking an egg before consumption. Instructions on the egg cartons explained this fact to users of the product. As plaintiff emphasized during trial, there are many possible sources of the SE outbreaks traced back to plaintiff's farms. A restaurant worker's improper handling of the eggs while preparing an egg-based food is a perfect example. As defendant's witness, Dr. John Mason, admitted at trial, emphasizing safe handling of the eggs would have been a very effective way to deal with the SE outbreaks.[31] Considered in light of the fact that defendant never tested plaintiff's *eggs,* the court does not believe defendant has established that plaintiff had an SE problem. Indeed, millions of plaintiffs eggs were safely consumed during the period between the three SE outbreaks and the time plaintiff's operations were restricted. For example, approximately 90 million eggs were sold from Cort Acres during this time.[32] Despite this fact, the regulations restricted millions of plaintiff's *healthy eggs* by prohibiting their sale in the table egg market.[33] The court will consider all of these observations throughout its analysis of plaintiff's claim.

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[31] *Id.* at 786.

[32] *Id.* at 190.

[33] The emphasis on "healthy" eggs is important, as plaintiff concedes that it is only seeking compensation for its SE-free eggs. Plaintiff calculates the number of said eggs by using approximations of how many eggs probably were SE infected—an amount that is considerably low. Indeed, out of 20,000 eggs, the parties estimate that only one to fourteen are SE positive. *Id.* at 331-335.

II. Takings Analysis

Plaintiff is asserting a regulatory taking and a categorical taking of its property. The main difference between the two is the amount of the economical viable use of the property that has allegedly been appropriated. This distinction results in the application of different analyses. *Compare Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) (applying a three-part regulatory takings test), *with Palm Beach Isles Assoc. v. United States*, 231 F.3d 1354, 1357 (Fed.Cir.2000) (explaining that it is unnecessary to consider whether there was an investment-backed expectation).

A. *Regulatory taking*

A regulatory taking does not involve a physical invasion or seizure of property. Instead, it concerns action that affects an owner's use of property, and is based on the general rule "that 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'" *767 Third Ave. Assocs. v. United States*, 48 F.3d 1575, 1580 (Fed. Cir.1995) (quoting *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922)). The government need not make use of, or take title in, the property at issue for a taking to occur because "[g]overnmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378, 65 S.Ct. 357, 89 L.Ed. 311 (1945)); *Aris Gloves*,

Inc. v. United States, 190 Ct.Cl. 367, 374, 420 F.2d 1386 (1970). While the United States Supreme Court (Supreme Court) has found conclusively that such regulatory takings may and do occur, it has not instituted a "set formula" for determining when governmental regulatory action becomes a compensable taking. *Penn Central*, 438 U.S. at 124, 98 S.Ct. 2646. Instead, because of the essentially factual nature of a takings claim, each claim is analyzed on an ad hoc, case-by-case basis. *Ruckelshaus*, 467 U.S. at 1006, 104 S.Ct. 2862 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979)). The Supreme Court nevertheless has identified significant factors for consideration in these cases, including: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986) (quoting *Penn Central*, 438 U.S. at 124, 98 S.Ct. 2646). When one of these factors is so overwhelming as to decide conclusively the validity of a regulatory takings claim, that factor may dispose of the claim altogether. *Ruckelshaus*, 467 U.S. at 1005, 104 S.Ct. 2862.

Plaintiff maintains defendant took its healthy eggs and layer houses by severely restricting their permitted use. Plaintiff believes its evidence at trial established all three elements of the regulatory takings analysis. Defendant contends plaintiff cannot satisfy the elements because its response to the tracebacks would have been the same regardless of whether the regulations were in effect. Defendant also emphasizes that the poultry industry is heavily regulated, so

plaintiff cannot argue that it had investment-backed expectations to the contrary.

1. Eggs

A consideration of the *Penn Central* factors is the best method for determining plaintiff's egg-related claim. Indeed, the facts and circumstances of this case indicate that the economic impact and plaintiff's investment-backed expectations are quite significant.

a. Economic impact

This prong of the *Penn Central* test ensures that "not every restraint imposed by government to adjust the competing demands of private owners [will] result in a takings claim." *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1176 (1994) (citing *Penn. Coal*, 260 U.S. at 413, 43 S.Ct. 158 ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.")). Plaintiff must show a serious financial loss from the regulatory imposition. *Id.* at 1177. Specifically, it must prove that the regulation denied the economically viable use of its property. *Id.* (citing *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987)). This factor looks at the property's fair market value and whether it has been reduced as a result of the regulations. *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1567 (Fed.Cir.1994).

Plaintiff contends the economic impact of the SE regulations was severe because they prevented plaintiff from selling healthy eggs in the table egg market. Plaintiff instead had to sell its eggs to the less profit-

able breaker egg market. Defendant argues that plaintiff only suffered a de minimis loss from this action because plaintiff incurred cost savings from producing breaker eggs. Defendant also asserts that plaintiff would have undertaken the same actions when it discovered the subsequent SE outbreaks, regardless of whether it was ordered to do so by the regulations. In addition, defendant argues that plaintiff did not bear a disproportionately heavier burden under the SE regulations because, without the regulations, plaintiff would have been subject to legal action by persons who consumed the infected eggs.

Plaintiff offered credible evidence at trial on the severity of the economic impact of the regulations. This testimony established that plaintiff was forced to divert over 57.5 million dozens of its healthy eggs to the breaker egg market. If there were no restrictions, plaintiff would have been able to sell these eggs at a higher price in the table egg market, thus generating higher revenue.

Indeed, the average cost for plaintiff to produce a dozen eggs during the period of restriction was 54.96 cents. Plaintiff received on average, however, only 41.46 cents per dozen for eggs sold to outside breaking plants, and only 46.64 cents per dozen for eggs processed in plaintiff's own breaking facilities. Plaintiff does not always make at least 54.96 cents per dozen when selling its eggs to the table market. Nevertheless, plaintiff would have made more than 46.64 cents per dozen if permitted to sell its product as table eggs. The average price of table eggs during the restrictions was 59 cents per dozen.[34] This is significantly more than the 41.46 cents plaintiff received

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[34] *Id.* at 1575.

for its eggs sold to outside breaker plants, and 46.64 cents it recovered for eggs it processed in its own breaker facilities. Clearly the regulations economically impacted plaintiff's operations in more than just a minimal way.

Defendant's own witnesses at trial supported this conclusion. For example, Dr. Mason, who headed the SE Task Force for four years, testified that the restrictions could mean financial ruin for table egg producers.[35] Dr. Arthur Hall added that "[b]reaker eggs are not rewarding,"[36] and Dr. Eric Ebel, a current USDA employee and a former member of the SE Task Force conceded that:

> The impact of the current S.e. program is severe for affected producers. These managers [of restricted farms] incur losses in revenue through the diversion of eggs to breakers, and expend additional capital during downtime for cleaning and disinfection.[37]

Dr. Ebel also acknowledged that producers faced considerable revenue losses from the required diversion of eggs, that breakers consistently provided lower returns than table eggs, and that producers subjected to the regulations experienced losses even more severe than if they had diverted voluntarily.[38] Dr. Reiff, defendant's economic expert, calculated that plaintiff's loss on breakers alone exceeded $9.2 million.[39]

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[35] *Id.* at 789.

[36] *Id.* at 904.

[37] Jt. Ex. 44 at 4. Tr. at 322.

[38] Tr. at 325-27.

[39] *Id.* at 1518.

This case is similar to *Yancey v. United States*, 915 F.2d 1534 (Fed.Cir.1990), where a USDA-imposed quarantine was found to have taken healthy breeder hens belonging to the plaintiff. The quarantine prevented the plaintiff from using the hens for breeding, thus forcing them to slaughter their hens and sell the meat in order to recover some economic return. *Id.* at 1536. The Federal Circuit affirmed this court's determination that the quarantine constituted a Fifth Amendment taking. *Id.* at 1542. The Federal Circuit concluded that "[a]lthough plaintiffs were able to mitigate their loss by slaughtering the flock, there was *no other alternative*, economically viable use for the flock while the quarantine was in effect." *Id.* at 1539.

In the present case, plaintiff sold over 97% of its eggs as table eggs before the restrictions. The SE regulations forced plaintiff to divert these eggs to the breaker market. This was not an economically viable option for plaintiff because it was not able to recoup its investment in these diverted eggs. Much like the plaintiff in *Yancey*, who was forced to sell its breeder hens for slaughter, the restrictions in this case made plaintiff sell its healthy eggs to a much less profitable market. Indeed, as the Seventh Circuit stated in its opinion on plaintiff's constitutional challenge to the regulations, "[a]n 'alternative' that is less attractive financially than slaughter is the functional equivalent of a command to destroy the animals." *Rose Acre Farms*, 956 F.2d at 672. The economic impact of the diversion was indeed severe.

b. Investment-backed expectations

This factor "limit[s] takings recoveries to owners who [can] demonstrate that they bought their property in reliance on a state of affairs that did not include

the challenged regulatory regime." *Loveladies Harbor*, 28 F.3d at 1177. The investment-backed expectation "must be more than a 'unilateral expectation or an abstract need.'" *Ruckelshaus*, 467 U.S. at 1005-06, 104 S.Ct. 2862 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980)). It must be reasonable. *Id.* at 1006, 104 S.Ct. 2862.

Plaintiff maintains it reasonably expected that it could sell its healthy eggs as table eggs in interstate commerce. The restrictions imposed by the regulations prevented plaintiff from distributing eggs in this manner. Plaintiff also emphasizes that the regulations went into effect after it had heavily invested in table-egg production. The SE regulations marked a departure from the prior regulations governing plaintiff's egg-producing operations. Plaintiff asserts the prior regulations gave plaintiff no reason to expect that its "good" eggs would be condemned.

Defendant contends the poultry industry is highly regulated, especially to control the spread of communicable diseases. Defendant therefore argues that plaintiff knew it could be subjected to stricter regulations at some point. Defendant also maintains that plaintiff had no reasonable expectation to sell SE-infected eggs in interstate commerce.

Prior to 1990, the regulatory scheme governing the egg industry was limited to egg-grading standards. 21 U.S.C. §§ 1031-1056. These standards resulted from defendant's belief that diseases, such as *salmonella*, generally existed outside of the shell, and could only enter the egg through cracks.[40] Thus, eggs were "graded" to ensure that no such cracks existed. The

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[40] *Id.* at 692.

prevailing law before 1990 also compensated producers when their eggs were destroyed by government mandate, even if these eggs were contaminated. 21 U.S.C. §§ 114a, 134a. Defendant's witness, Dr. Robert Tauxe, chief of the Foodborne and Diarrheal Diseases Branch at CDC, acknowledged at trial that CDC and the Food and Drug Administration concluded in the 1970's that shell eggs were neither a hazardous food nor associated with food-borne salmonellosis.[41] Indeed, CDC concluded that the egg grading standards "eliminated human consumption of high-risk shell eggs."[42] In fact, raw eggs were again considered safe to eat.[43] It was not until after the SE regulations were enacted that CDC re-classified shell eggs as a potentially hazardous food.

As defendant points out, the poultry industry in general is highly regulated. Nevertheless, the issue of *salmonella* in eggs is not an area that experienced much regulation before 1990. Based on the facts, it is quite reasonable for plaintiff to have had an investment-backed expectation that its healthy eggs would not be restricted from sale as table eggs. The result of the SE regulations, however, was to restrict not only the SE contaminated eggs, if there were any, but also plaintiff's SE-free eggs. This change in the law was not foreseeable, considering defendant's prior conclusion that the grading system eliminated the problem of SE in eggs. This element of the regulatory takings analysis favors plaintiff.

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[41] *Id.* at 673-74.

[42] *Id.* at 673.

[43] *Id.*

c. Character

The character factor requires the court to "consider the purpose and importance of the public interest reflected in the regulatory imposition." *Loveladies Harbor*, 28 F.3d at 1176. A regulation that burdens private property may "constitute a 'taking' if [the burden is] not reasonably necessary to the effectuation of a substantial public purpose." *Penn Central*, 438 U.S. at 127, 98 S.Ct. 2646. The fundamental purpose of the Takings Clause is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960). The regulations at issue can be examined under the lens of state nuisance law. "If the regulation prevents what would or legally could have been a nuisance, then no taking occurred. The state merely acted to protect the public under its inherent police powers." *Creppel v. United States*, 41 F.3d 627, 631 (Fed. Cir.1994).

Plaintiff argues that defendant overreacted to the isolated SE outbreaks by enacting scientifically unsupported regulations. Plaintiff maintains the regulations were based on a flawed premise—that if hens or their environment tested positive for SE, the eggs were presumptively positive. Plaintiff argues the regulations "went too far" and were not in the public's interest.

Defendant contends its actions were a proper exercise of the government's police power. Defendant also maintains that conduct promoting the health and safety of the public does not constitute a taking. Defendant analogizes the *salmonella* outbreaks to nuisance law. In addition, defendant asserts the

public has a compelling interest in controlling the spread of SE.

As discussed above, the court concludes the SE regulations were misguided because they relied on ineffective testing methods. *Salmonella* may be considered a nuisance, but defendant has not established that the *salmonella* epidemic was largely the result of plaintiff's eggs. It is true that the public has a strong interest in eating safe food, however, the regulations at issue went too far in protecting this interest by prohibiting the sale of plaintiff's healthy eggs as table eggs.

Moreover, plaintiff shared a disproportionate amount of the burden of the SE regulations. APHIS administered USDA's SE traceback program until mid-1995. In 70% of the reported SE outbreaks, a probable source could not be determined. As of 1996, there were more than 1,000 large flocks with SE in the United States, nevertheless, USDA restricted only thirty-eight of them between 1990 and 1994. In total, over 1.3 billion eggs were diverted, pursuant to the regulations. Restricted eggs from plaintiff represented more than one-half of this amount (approximately 700 million). The Federal Circuit has asked the pertinent question "has the Government acted in a responsible way, limiting the constraints on property ownership to those necessary to achieve the public purpose, and not allocating to some number of individuals, less than all, a burden that should be borne by all?" *Florida Rock Indus.*, 18 F.3d at 1571. The answer to this question is "no."[44]

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[44] The court also finds unpersuasive defendant's argument premised on the government's police power. Unlike state governments, the federal government has no inherent police power.

The court therefore concludes that the SE regulations posed an unlawful taking of plaintiff's healthy eggs. Plaintiff is entitled to just compensation for the loss of these eggs.

2. Houses

Plaintiff also argues that its restricted hen houses were temporarily taken while being wet cleaned and awaiting reinspection. Plaintiff maintains their use was severely limited, which disrupted plaintiff's entire operation. Plaintiff seeks compensation for loss of production, overall disruption costs, and cleaning and disinfection costs. Defendant contends that plaintiff cannot claim there was a temporary taking because the houses themselves were not restricted. Defendant asserts that requiring houses to be tested, cleaned, disinfected, and monitored did not interfere with plaintiff's property rights. In addition, defendant argues plaintiff is merely seeking consequential damages with this claim, which takings law precludes.

Since plaintiff is only alleging that its houses were taken for certain periods of time, plaintiff is raising a temporary regulatory takings claim. Indeed, it regained full use of the houses after the restrictions were lifted. This is in contrast to its claim for healthy eggs, which were taken permanently because the specific eggs that were regulated, totaling nearly 700 million, could not be used again after they were sent to the breaker plants. The question of whether or not there has been a temporary regulatory taking

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United States v. Morrison, 529 U.S. 598, 619 n. 8, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) ("[T]he principle that '[t]he Constitution created a Federal Government of limited powers, while reserving a generalized police power to the States, is deeply ingrained in our constitutional history.'") (citations omitted).

depends on the particular circumstances of the case. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 336, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002).

As a preliminary matter, the court must separate plaintiff's actual takings claim from its allegation of consequential damages. Indeed, plaintiff's assertions of loss of production, overall disruption costs, and cleaning and disinfection costs are merely consequences of the regulations.[45] These consequential damages are not recoverable. *Yuba Natural Resources, Inc. v. United States*, 904 F.2d 1577, 1581 (Fed. Cir.1990) (citing *Kimball Laundry Co. v. United States*, 338 U.S. 1, 7, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949)); *see also General Motors Corp.*, 323 U.S. at 379, 65 S.Ct. 357; *Yancey*, 915 F.2d at 1542; *Georgia-Pacific Corp. v. United States*, 226 Ct.Cl. 95, 147, 640 F.2d 328 (1980); *Foster v. United States*, 2 Cl.Ct. 426, 445 (1983).

What remains, therefore, is plaintiff's allegation that the regulations caused a taking of its layer houses during the periods of cleaning, disinfection and inspection. Specifically, plaintiff argues the extra time it took to wet clean the houses, as opposed to plaintiff's normal practice of dry cleaning, served as a taking of the houses for those particular days. On average, restricted houses sat empty for forty-six days while unrestricted houses were empty for five days.[46] Plaintiff also alleges that the period of nonuse

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[45] In fact, it is debatable whether plaintiff's claim for the taking of its houses is an actual takings claim or just another request for consequential damages.

[46] Plaintiff's Exhibit (Pl.'s Ex.) 318; Tr. at 1235, 1576-77.

while they waited for government inspection constituted a taking. The court is not convinced.

The court has stated that it believes the regulations were misguided because they required testing of the environment but not the eggs. Nevertheless, the court does not believe that longer cleaning times and the periods awaiting inspection constitute a valid claim for the taking of plaintiff's houses. As the Supreme Court recently stated, "[a] rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decision-making." *Tahoe-Sierra Preservation Council*, 535 U.S. at 335, 122 S.Ct. 1465. The court concludes that the facts and circumstances of this case preclude a finding that plaintiff's houses were taken by the regulations and/or their effect.[47]

B. *Categorical taking*

A categorical taking is one in which *all* economically viable use has been taken by the regulatory imposition. *Palm Beach Isles Assoc.*, 231 F.3d at

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[47] The court does not explicitly discuss the *Penn Central* factors in this section because it believes the facts and circumstances as a whole prove there was no taking. The *Penn Central* test is premised on a facts and circumstances analysis. *Tahoe-Sierra Preservation Council*, 535 U.S. at 336, 122 S.Ct. 1465. The parties seem to agree with this approach, as they do not specifically discuss the *Penn Central* factors in relation to this claim. Regardless, the court believes that fairness and justice do not dictate that the public bear the burden of the expenses plaintiff incurred from the cleaning, disinfection, and inspection of its houses. *Ruckelshaus*, 467 U.S. at 1005, 104 S.Ct. 2862 (determining that when one of the *Penn Central* factors is so overwhelming as to decide conclusively the validity of a regulatory takings claim, that factor may dispose of the claim altogether).

1357. This takings claim is distinct from a general regulatory taking which "prohibits or restricts only some of the uses that would otherwise be available to the property owner." *Id.* There is no need for the property owner to prove an investment-backed expectation for a categorical takings claim. *Id.* at 1364. Indeed, a categorical taking is akin to a physical taking. *Id.* at 1357.

Plaintiff contends that defendant's appropriation of 6,741 of its hens for SE testing constitutes a categorical taking. Plaintiff emphasizes that the existence of SE in the hens, which was limited to only a small amount of those tested, did not prove that SE actually existed in plaintiff's eggs. Defendant maintains that categorical takings claims apply to real property, which is not at issue in this case.

Contrary to defendant's assertions, a categorical taking is not limited to real property. Indeed, courts have found the principle to apply to personal property as well. *Armstrong*, 364 U.S. at 46-48, 80 S.Ct. 1563 (government's seizure of boats on which plaintiff held mechanics lien a taking); *Nixon v. United States*, 978 F.2d 1269, 1284-85 (D.C.Cir.1992) (seizure of former president's papers a taking). Defendant's attempt to preclude plaintiff's claim with such a superficial statement of the law is unsuccessful.

As for the merits of plaintiff's categorical takings claim, the court has already concluded that defendant's testing procedures were flawed. Said testing focused on the hens and their environment. Defendant never actually tested the eggs for SE, despite the fact that such testing was feasible and would have been directed at the alleged source of the SE outbreaks. Plaintiff offered testimony at trial that proved SE can exist in a hen and still not contaminate the eggs it

produces.[48] Because the court believes defendant's testing methods were misguided, and since defendant did appropriate 6,741 of plaintiff's hens for this testing, the court concludes that defendant did categorically take said hens. Plaintiff is entitled to just compensation for this taking.

C. *21 U.S.C. § 134a*

Plaintiff also asserts in Count II of its complaint that it seeks compensation under 21 U.S.C. § 134a, which allows for the seizure, quarantine, and disposal of livestock or poultry to guard against the introduction or dissemination of communicable disease. The statute provides certain payment provisions for these activities. Defendant argues the statute is inapplicable because the Secretary did not declare an "extraordinary emergency" related to SE.

Section 134a states, in pertinent part:

> [T]he Secretary shall compensate the owner of any animal, carcass, product, or article destroyed pursuant to the provisions of this section. Such compensation shall be based upon the fair market value as determined by the Secretary, of any such animal, carcass, product, or article at the time of the destruction thereof. Compensation paid any owner under this subsection shall not exceed the difference between any compensation received by such owner from a State or other source and such fair market value of the animal, carcass, product, or article.

The court interprets this statute as applying only to plaintiff's egg and hen-related claims. The court has

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[48] Tr. at 482-83.

concluded that pursuant to the Fifth Amendment, plaintiff is entitled to compensation for these items. Section 134a does not provide plaintiff any additional relief.[49]

III. Just Compensation

The court has concluded that plaintiff is entitled to just compensation for the taking of its healthy eggs and hens. Indeed, plaintiff "is to be put in the same position monetarily as [it] would have occupied if [its] property had not been taken." *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473-74, 93 S.Ct. 791, 35 L.Ed.2d 1 (1973) (citation omitted). Plaintiff seeks the following compensation: (1) $7,376,050.77 for restricted egg sales; (2) $15,671.99 for losses from layer hens taken for necropsy; (3) $2,987,460.05 for empty house losses from depopulation through inspection; (4) $1,432,034.44 for reduced production during restricted periods before required depopulation; (5) $2,769,134 for reduced production during unrestricted periods before required depopulation; (6) $2,158,307.93 for cleaning and disinfection costs; (7) $44,574.82 for purchase of table eggs to cover obligations; (8) $70,656.78 for storage costs for restricted eggs; (9) $5,961,550.64 for losses due to disruption of overall business; and (10) interest. The total of these amounts, excluding interest, is $22,815,441.42. After accounting for revenue plaintiff received for the sale of its breeder eggs and started pullets, which equals

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[49] The court notes that plaintiff has not set forth any specific claims related to section 134a, and does not mention this statute in its post-trial briefing.

$1,226,426.04,[50] the total amount plaintiff seeks is $21,589,015.38, plus interest.

A. *Consequential damages*

A threshold issue related to plaintiff's damages request is the determination of consequential damages. Defendant argues that takings law does not provide for the recovery of said damages, which may result from the actual taking. Plaintiff maintains that the damages it seeks are not consequential.

Not all losses that plaintiff suffers as a result of a taking are compensable under the Fifth Amendment. *United States ex rel. Tennessee Valley Authority v. Powelson*, 319 U.S. 266, 281, 63 S.Ct. 1047, 87 L.Ed. 1390 (1943). "It is a well settled principle of Fifth Amendment taking law . . . that the measure of just compensation is the fair value of what was taken, and not the consequential damages the owner suffers as a result of the taking." *Yuba Natural Resources*, 904 F.2d at 1581 (citing *Kimball Laundry Co.*, 338 U.S. at 7, 69 S.Ct. 1434); *see also General Motors Corp.*, 323 U.S. at 379, 65 S.Ct. 357; *Yancey*, 915 F.2d at 1542; *Georgia-Pacific Corp.*, 226 Ct.Cl. at 147, 640 F.2d 328; *Foster*, 2 Cl.Ct. at 445. Examples of costs that are not recoverable because they are consequential are destruction of the business, frustration of contract or business, the cost of compliance with the regulations, the losses sustained by the owner because of the difficulty of finding other premises, moving costs, and expenses incurred in having to readjust manufacturing operations. *See, e.g., Mitchell v. United States*, 267 U.S. 341, 345, 45 S.Ct. 293, 69

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[50] The treatment of this revenue in relation to plaintiff's costs is discussed below.

L.Ed. 644 (1925); *Atlas Corp. v. United States*, 15 Cl.Ct. 681, 688 (1988), *aff'd*, 895 F.2d 745, 755-56 (Fed.Cir.1990), *cert. denied*, 498 U.S. 811, 111 S.Ct. 46, 112 L.Ed.2d 22 (1990); *Klein v. United States*, 179 Ct.Cl. 910, 915, 375 F.2d 825 (1967), *cert. denied*, 389 U.S. 1037, 88 S.Ct. 770, 19 L.Ed.2d 824 (1968).

The court concludes that plaintiff's request for damages to cover: (1) reduced production during restricted periods before required depopulation; (2) reduced production during unrestricted periods before required depopulation; (3) cleaning and disinfection costs; (4) purchase of table eggs to cover obligations; (5) storage costs for restricted eggs; and (6) losses due to disruption of overall business; is an attempt to recover consequential damages, and therefore, is denied. Specifically, the reduced production costs and losses due to the disruption of its overall business are claims related to the frustration of its business. Plaintiff cannot recoup these expenses. *Klein*, 179 Ct.Cl. at 915, 375 F.2d 825. Also, its request for cleaning and disinfection costs is an example of expenses it incurred while complying with the regulations. These too are not recoverable. *Atlas*, 15 Cl.Ct. at 688. The same is true for the storage costs and the purchase of table eggs to cover obligations, which were incidental expenses related to the restrictions.

In addition, the court notes that plaintiff is not entitled to damages for losses related to plaintiff's empty houses. This description pertains to most of the costs plaintiff asserts. The court has concluded that plaintiff does not have a viable takings claim for the temporary impediment to its use of the layer houses.

B. *Losses from restricted egg sales*

The court does believe, however, that plaintiff has asserted a valid takings claim for the diversion of its healthy eggs during the time of restriction. Plaintiff seeks $2,641,635 for the eggs it was forced to process in its own breaker facility. Plaintiff asks for $4,734,415.77 for the healthy eggs it sold to outside breakers. The total amount for the losses of the diverted eggs is $7,376,050.77. This figure takes into account the revenue plaintiff received from selling the eggs as breaker eggs. Said revenue is subtracted from the overall expenses plaintiff incurred.[51] The $7,376,050.77 is the total after making this subtraction.

Defendant argues the amount plaintiff requests is inaccurate, because plaintiff's expert witness, Dr. Richard Just, made numerous critical errors in his analysis.[52] Defendant contends Dr. Just incorrectly assumed that plaintiff would not have responded in the same way to the SE tracebacks if the regulations were not in effect. Defendant also claims Dr. Just overstated the hens' laying rate that would have occurred in the but—for world. Defendant further asserts that Dr. Just fails to account for eggs produced at unrestricted houses. In addition, defendant believes Dr. Just applied incorrect farm-wide productivity data to his analysis.

As for defendant's claim that plaintiff's response to the tracebacks would have been the same if there

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[51] *Id.* at 1196.

[52] Some of the alleged errors defendant raises in its briefs are no longer pertinent because the court has already discounted them. The court, therefore, only addresses defendant's arguments that still have relevance.

were no regulations, the court has already concluded that plaintiff presented credible evidence to the contrary. The court restates this fact to emphasize that Dr. Just's assumptions on plaintiff's actions in the but-for world are accurate.

Moreover, the court found Dr. Just's testimony at trial very credible. For example, Dr. Just made clear that he applied a layer rate of 0.70475 per hen each day for his farm-wide productivity data.[53] The court has made the factual finding that approximately 0.7 is an accurate representation of the laying rate, pursuant to credible testimony plaintiff presented. Dr. Just, therefore, did not err when he used 0.70475 in his farm-wide productivity data. He also emphasized that he accounted for hens that were not laying because of special circumstances such as remodeling of the houses.[54] In addition, the court believes that Dr. Just did not overstate the hen's laying rate in the but-for world, and that he properly considered the effect of eggs produced at unrestricted houses.

The court concludes that Dr. Just's calculations are credible and that they accurately reflect plaintiff's damages related to the taking of its healthy eggs. Plaintiff is therefore entitled to $7,376,050.77 for the loss of said eggs.

C. *Losses for hens taken for necropsy*

Plaintiff also seeks $15,671.99 for its hens defendant took for necropsy. The court has held that plaintiff's categorical takings claim for these hens is valid. Defendant has focused on challenging the takings portion of plaintiff's claim related to the birds. It

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[53] Tr. at 1595.

[54] Tr. at 1596.

has set forth no specific arguments questioning the accuracy of the $15,671.99 amount. Since defendant appears to not challenge this sum, and because the court believes Dr. Just accurately determined this figure, the court concludes that plaintiff is entitled to $15,671.99 as just compensation for the hens taken for necropsy.

D. *The effect of plaintiff's revenue for breeder eggs and started pullets*

As mentioned above, plaintiff seeks total losses of $21,589,015.38, excluding interest. Plaintiff reached this amount after subtracting $1,226,426.04 of revenue it received from breeder eggs and started pullets sales. Plaintiff originally sought $22,815,441.42, excluding interest, before making this subtraction.

If the court were awarding plaintiff all of the damages it seeks, the treatment of this revenue would not be an issue because Dr. Just properly considered it in his report. The court, however, is only allowing plaintiff to recover $7,376,050.77 for the taking of its healthy eggs and $15,671.99 for the taking of its hens for necropsy. The total of these amounts is $7,391,722.76. The court must therefore consider how the revenue plaintiff received from the breeder eggs and started pullets affects this award.

Before making this determination, it is worth noting that Dr. Just also included in his reports revenue from the sale of eggs purchased to cover obligations. This amount has already been accounted for, however, in plaintiff's calculation of eggs purchased to cover obligations, which the court has concluded is only a consequential damage.[55] Plaintiff originally requested

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[55] *Id.* at 1229.

$664,579.12 for this expense. In its post-trial briefing it reduced the figure to $44,574.82, because it subtracted the revenue made from the eggs purchased to cover obligations.[56] Thus, only the revenue from the breeder eggs and started pullets still needs to be taken into account.

If this revenue can be related to a specific cost plaintiff incurred, then it may not affect the total amount the court awards plaintiff. For example, the revenue plaintiff received from the sale of the eggs purchased to cover obligations was offset by the costs plaintiff incurred from initially buying these eggs. There is a clear correlation between the expense and the revenue. This is not the case, however, with the breeder eggs and started pullets. There is no clear corresponding expense that can be offset by this revenue.

The lack of a clear nexus between the revenue and a specific expense does not mean the revenue should be ignored. Indeed, plaintiff sold its breeder eggs and started pullets as an attempt to minimize its losses during the restriction period.[57] Much of these losses were a result of the restriction of plaintiff's healthy eggs. The court therefore believes the amount plaintiff receives for the taking of its healthy eggs should be offset by the revenue plaintiff earned by the sale of the breeder eggs and started pullets. Thus, the $7,391,722.76 plaintiff has established as its damages from the taking of its healthy eggs should be reduced by the $1,226,426.04 plaintiff received as revenue. This leaves an amount of $6,165,296.72.

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[56] Pl.'s Ex. 318; Tr. at 245.

[57] Tr. at 1230.

E. *Interest*

Plaintiff therefore is entitled to $6,165,296.72, plus interest computed from the date of the taking to the date of payment. The parties dispute, however, the type of interest plaintiff should receive. Plaintiff argues that compound interest is appropriate compensation for the time value of its commercial property taken. Plaintiff also believes it sufficiently replaces the investment opportunities plaintiff lost when defendant took said property. Defendant disagrees claiming that plaintiff should receive simple interest equivalent to the rate used for government borrowing.

In general, interest on a claim against the government may be awarded only pursuant to a contract or if it is expressly provided for by an Act of Congress. 28 U.S.C. § 2516(a) (1994). An exception to this rule, however, arises when a taking entitles a claimant to just compensation under the Fifth Amendment. *United States v. Alcea Band of Tillamooks*, 341 U.S. 48, 49, 71 S.Ct. 552, 95 L.Ed. 738 (1951); *Whitney Benefits, Inc. v. United States*, 30 Fed.Cl. 411, 414 (1994). Indeed, plaintiff is entitled to interest computed from the date of the taking to the date of payment by defendant. *Formanek v. United States*, 26 Cl.Ct. 332, 341 n.11 (1992). Moreover, compound interest may be necessary "to accomplish complete justice" under the just compensation clause of the Fifth Amendment. *Dynamics Corp. of Am. v. United States*, 766 F.2d 518, 520 (Fed.Cir.1985). The court considers whether the taking affected plaintiff's investment opportunities when determining if compound interest is appropriate. *Whitney Benefits, Inc.*, 30 Fed.Cl. at 415-16.

After careful review of the facts and circumstances of this case, the court concludes that plaintiff is only entitled to simple interest, calculated using the 52-week treasury bill rate. Although plaintiff has requested that the Contract Disputes Act (CDA) rate be used, there is no statutory mandate for CDA rates. *NRG Co. v. United States*, 31 Fed.Cl. 659, 665 (1994). While it is common to use CDA rates, the court has opposed them where they would provide "a windfall to property owners well in excess of their economic loss." *Id.* at 670.

Just compensation should ensure that the owner "is placed in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation." *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984). Neither compound interest nor CDA rates are appropriate, because the court does not believe that the taking of plaintiff's healthy eggs and hens significantly affected its investment opportunities. The court has found that the application of the regulations at issue was "misguided, at best." The court recognizes, however, that the important ends of public health and safety were the purposes of these regulations. Plaintiff must be compensated for the unreasonable application of such laws, but some costs attend even to their proper enforcement. A company engaged in the production and distribution of food cannot expect to be fully indemnified against such costs. Under these unique circumstances, awarding plaintiff the lesser 52-week treasury bill rate, calculated as simple interest, is fully "just." Said simple interest began to accumulate on October 5,

1990, which was the date plaintiff's healthy eggs were first restricted.[58]

IV. Attorney Fees and Expenses

Plaintiff has filed a motion for the award of attorney fees and expenses. The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA), 42 U.S.C. § 4654(c), provides reimbursement in takings cases brought under the Tucker Act for "reasonable costs, disbursements, and expenses, including reasonable attorney . . . fees, actually incurred because of" such proceeding. A total of $2,759,216.71 is sought, including $30,908.36 in supplemental fees related to the preparation of the URA motion. This amount includes $2,245,527.63 in attorney fees, $298,486.36 in expert and consultant fees, and $215,202.72 in expenses.

Defendant "does not dispute that, pursuant to the URA, [plaintiff] is entitled to reimbursement for the amount of reasonable attorneys' fees and costs that it actually incurred in successfully advancing its claims against the United States."[59] Defendant objects, however, to the amount claimed by plaintiff, arguing that only $1,562,753.50 is allowable as reasonable costs and expenses.

A. *Attorney Fees*

Relying on *Florida Rock Indus. v. United States*, 9 Cl.Ct. 285 (1985), plaintiff contends that "the Court should defer to the market's discipline and treat the fees and other expenses that [plaintiff] actually paid

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[58] Joint Stipulation Of Events at 2.

[59] Defendant's Opposition To Plaintiff's Motion For Award Of Attorneys' Fees And Expenses (Def.'s Opp'n) at 2.

as presumptively reasonable."[60] Indeed, when addressing the reasonableness of attorney fees,

> [t]he court is reluctant to second-guess counsel's time allocation for what has proved to be a winning case. Plaintiff was entitled to hire competent counsel, and counsel, in turn, had the responsibility to undertake all reasonable efforts in securing a victory. What constitute reasonable efforts cannot be defined with precision; it is a matter of professional judgment as to which the court will allow great leeway. In a case such as this, the risk of abuse is minimal because plaintiff has no assurance of recovering and must assume it will bear the full cost of the litigation. Plaintiff can therefore be expected to exercise control over the time spent and the rates charged.

Florida Rock, 9 Cl.Ct. at 288-89.

Defendant asserts, however, that "plaintiff has the burden of proving a reasonable fee"[61] and argues that the court should use the lodestar method in calculating an appropriate fee award. That method consists of "determining first the reasonable hours expended and then multiplying that figure by each attorney's reasonable hourly rate." *Town of Grantwood Village v. United States*, 55 Fed.Cl. 1, 3 (2003). The lodestar formula is routinely used, but the court has stated that "where there is a bona fide contractual arrangement whereby the client has committed to pay the amount billed by the attorneys . . . the court should not second-guess the workings of the market in determining the reasonableness or

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[60] Rose Acre's Memorandum In Support Of Motion For Fees And Expenses (Pl.'s Mot.) at 2.

[61] Def.'s Opp'n at 4.

appropriateness of the fees and expenses." *Florida Rock*, 9 Cl.Ct. at 288. This reasoning is particularly persuasive where plaintiff has not only actually incurred and committed to pay, but has *in fact paid* all of the fees and expenses submitted for the court's review. The court accepts this standard, absent a showing of abuse such as fees that are "excessive, redundant, or otherwise unnecessary." *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Plaintiff, however, still has the "burden of demonstrating that the amount sought for attorneys' fees and costs meets statutory requirements." *Preseault v. United States*, 52 Fed.Cl. 667, 670 (2002) (citing *Hensley*, 461 U.S. at 437, 103 S.Ct. 1933).

The relevant component of the URA states that "reasonable" attorney fees and expenses "actually incurred because of" this proceeding shall be reimbursed to plaintiff. 42 U.S.C. § 4654(c). Although plaintiff is accorded great leeway with respect to what constitutes a "reasonable fee," it can recover no fees or expenses that were not incurred "because of" the takings claim or those that were not "actually incurred." Further, where "plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee." *Hensley*, 461 U.S. 424 at 440, 103 S.Ct. 1933. In other words, "plaintiff should not recover for time spent litigating issues as to which it did not prevail." *Florida Rock*, 9 Cl.Ct. at 289.

Defendant alleges each of these deficiencies with respect to various aspects of plaintiff's motion. It is argued that certain fees were not a part of the present litigation and therefore not "because of" this proceeding; that certain fees were not "actually

incurred;" and that certain fees and expenses are unreasonable because they are redundant or unsubstantiated. The court will consider each of these arguments.

1) Pre-Litigation Fees

Defendant objects to $23,075.21 in fees incurred prior to October 13, 1992, the date plaintiff filed its complaint with the court in this proceeding. Defendant alleges that the work associated with these fees was incurred as part of proceedings before the United States Court of Appeals for the Seventh Circuit or related to a May 8, 1992, complaint before this court, which was subsequently dismissed.

The United States Court of Appeals for the Federal Circuit has held that "pre-litigation expenses are precluded from reimbursement under 42 U.S.C. § 4654(c)." *Yancey v. United States*, 915 F.2d 1534, 1543 (Fed.Cir.1990). Plaintiff counters, "[t]he fact that Rose Acre began preparing its complaint in December 1991 does not mean this time is not compensable. It took Rose Acre a considerable amount of time and effort to investigate the relevant facts, research the relevant law, and marshal these facts into a persuasive pleading."[62] *Yancey* acknowledged this effort and held that "'the significant effort expended' in 'the filing of the petition' may be compensable under the statute if proper documentation were provided." *Id.* (quoting *Cloverport Sand & Gravel Co. v. United States*, 10 Cl.Ct. 121, 124 (1986)).

The leeway accorded by the presumption of reasonableness does not extend to fees which are arguably

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[62] Rose Acre's Reply In Support Of Motion For Attorneys' Fees And Expenses (Pl.'s Rep.) at 5.

incurred as part of a prior proceeding. It is clear from the billing records that a large portion of the bills during that period relate to drafting the complaint in this proceeding. The court finds the documentation insufficient, however, to determine whether all of these fees are properly attributed to this action. For instance, a $650 entry on February 12, 1992, indicates, in part, "telephone conferences with Marcus Rust re 7th Circuit decision . . . . " [63]Another entry for $700 on April 29, 1992, includes a charge for a "telephone conference with Brian Burke re status of appeal."[64] Yet another entry, on August 27, 1992, includes a charge for reviewing the "petition for cert."[65] It is possible that some part of these and other similar charges would have been incurred during the preparation of the present action, prior proceedings notwithstanding. Ambiguity should be resolved, however, against the claimant, *White Mountain Apache Tribe of Arizona v. United States,* 30 Fed.Cl. 8, 21 (1993). After reviewing the billing records, the court believes that no more than 25 percent of those fees claimed as unallowable by defendant could, in fact, be related to an earlier proceeding. Plaintiff's total award is reduced accordingly, by $5,768.80.

2) Fees Not "Actually Incurred"

Defendant also objects to $15,056.48, which represents fees paid to the firm of Spriggs & Hollingsworth (Spriggs) as local counsel. There is no dispute, however, that the billing records from Spriggs

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[63] Pl.'s Mot., App. Volume II.

[64] *Id.*

[65] *Id.*

relate to work done in this proceeding. Defendant contends that these fees were not actually incurred by plaintiff because Spriggs billed plaintiff's primary counsel, Sommer Barnard Ackerson (Sommer Barnard), and no fee agreement showing an obligation to pay these bills by Sommer Barnard has been presented.[66] Plaintiff counters by affidavit that these fees were, in fact, incurred and paid in full.[67] Plaintiff is entitled to a reimbursement of said fees.

3) Unallowable Fees

Defendant argues that some portion of plaintiff's fees are not reimbursable because they are insufficiently documented, redundant, or related to issues on which plaintiff did not prevail.

On the issue of redundant or excessive billing, it is asserted that "[t]here is no doubt that Rose Acre's counsel heavily staffed this case."[68] As evidence, defendant recites the number of lawyers working on the case at various times, including that during 2001, Sommer Barnard "staffed at least 15 attorneys and at least two legal assistants on the case, including five new attorneys."[69]

Plaintiff counters, however, that these numbers are misleading. Many of these attorneys were summer associates or others with lower billing rates than those who might have otherwise worked on the case. To that end, the large number of attorneys may have been a cost savings device as likely as an indication of

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[66] Def.'s Opp'n at 11.

[67] Supplemental Affidavit of Robert R. Clark ¶ 7.

[68] Def.'s Opp'n at 25.

[69] *Id.* at 26.

abusive staffing or billing practices. Under any circumstances, as this court has stated before, an argument "that plaintiff's hours are excessive because they greatly exceed those spent by defense counsel overlooks a number of important considerations. Plaintiff can be expected to work harder because it carries the burden of proof." *Florida Rock*, 9 Cl.Ct. at 289. This is especially true in a regulatory takings case. There is no apparent abuse in the staffing or billing, and for the reasons stated above, the court will not second-guess plaintiff's decisions in this regard.

Defendant next argues that plaintiff's award should be reduced by $395,305.62, which is the total of all its bills with material redacted.[70] It is alleged that "[i]t is impossible to discern to what the redacted work relates, or if it relates to this case at all."[71] This argument, however, is unpersuasive. Plaintiff contends that its redactions serve the purpose of protecting privileged entries. The court could request an *in camera* review of the unredacted pages, but it is not necessary to do so. The court is mindful of the injunction that "[a] request for attorney's fees should not result in a second major litigation." *Hensley,* 461 U.S. at 437, 103 S.Ct. 1933. The redactions eliminate single words and phrases, but by taking each entry in its context, it is clear enough that all of the fees charged relate to this proceeding. Defendant is troubled by lines redacted that immediately follow the "Total Charges For This Bill" entry on a certain number of the bills and speculates that these redactions may hide discounts or other indications that the fees listed were not actually incurred. The court is satisfied that

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[70] Def.'s Opp'n at 22.

[71] *Id.*

this is not so. Sommer Barnard used a standard billing form and it is clear from invoices not redacted that these lines refer to periodic unpaid balances. What is important for URA purposes is that the fees were actually incurred and paid, not whether they were paid on time at any given moment during the proceeding.

Finally, defendant asks for a blanket reduction of plaintiff's fee by 30 percent due to bills with allegedly insufficient detail and work performed in pursuit of an untenable theory of the case.[72]

"[I]ndicating that a conference was held between members and associates of the firm, without any indication of the subject matter," for instance, "does not give the Court the requisite information to glean reasonableness."[73] The court disagrees. All of the entries defendant objects to are related to the present proceeding, including those described as "block billing," where numerous tasks are grouped together under one line item. Plaintiff had the ultimate responsibility for these charges and "[p]laintiff can therefore be expected to exercise control over the time spent . . . ." *Preseault*, 52 Fed.Cl. at 680 (quoting *Florida Rock*, 9 Cl.Ct. at 289). The billing method evidences no abuse to justify a blanket reduction.

Defendant is more convincing when it argues that time spent pursuing a claim for consequential damages should be excluded. The court has held that, as a matter of law, plaintiff was not entitled to consequential damages. Plaintiff counters that facts "gathered during discovery and adduced at trial were indis-

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[72] *Id.* at 17-18, 29.

[73] *Id.* at 18.

pensable to the *liability* phase" of the case and it "would not have spent any *less time* on this case even if it had not sought to recover damages the Court found to be consequential."[74] Plaintiff's point is well taken, but the court is not convinced that the abandonment of this damage claim would have resulted in zero savings. A 10 percent reduction of the attorney fee component of the URA claim is appropriate.

Plaintiff is alleging incurred attorney fees of $2,245,527.63. Notwithstanding this claim, $5,768.80 must be subtracted to account for those fees which relate to a prior proceeding. Plaintiff is entitled to the remainder, subject to a 10 percent reduction, for a total of $2,015,782.95.

B. Expert Fees, Expenses and Costs

Plaintiff claims $298,486.36 in expert fees. Defendant argues that this total should be reduced by $103,206.95, for a total of $195,279.41, due to inefficiency and unsubstantiated charges by Drs. Patricia Curtis and Richard Just. A total of $213,774.86 in costs and expenses is also claimed by plaintiff, which defendant argues should be reduced by 40 percent for allegedly failing to make a sufficiently detailed report of those expenses.

Defendant argues that it should not be made to pay $10,000 of the fees charged by Dr. Curtis because the invoices presented by her did not specify in a detailed manner how her time was spent. Since she was present at trial for 10 days, however, defendant concedes that $16,000 of the total is reasonable. Plaintiff counters that "Dr. Curtis was paid the lesser of $200 per hour or $2,000 per day for her time. For trial, Dr. Curtis spent 13 days in Washington, beginning on

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[74] Pl.'s Rep. at 14 (emphasis in original).

Sunday April 28, 2002, and staying through and including Friday, May 10."[75] It is reasonable that Dr. Curtis would have spent more time on the case than the bare number of hours in trial, thus no reduction in her fee is warranted.

Defendant also objects to $93,206.95 of Dr. Just's fees on the premise that his work was a duplication of that done by the Law and Economic Consulting Group (LECG). Dr. Just was at one time affiliated with LECG and its staff did much of the preliminary work collecting and analyzing the market and other data that helped plaintiff substantiate its takings claim. Defendant asserts, however, that an undue amount of time was spent by Dr. Just duplicating the work of LECG because the initial work was unsatisfactory. Dr. Just stated that he "came to realize that some of the information I had been provided by the LECG people when I came into the case was not quite correct."[76] Plaintiff argues, however, that it "was entitled to have its expert expend the time and energy he deemed appropriate to hone, sharpen and fine tune these massive amounts of cost and price data and to present the most compelling economic case the data would support."[77] The court agrees with this statement, but costs that are "excessive, redundant, or otherwise unnecessary" cannot be recovered under the statute. *Hensley*, 461 U.S. at 434, 103 S.Ct. 1933. "For this reason the costs of having one set of experienced, competent, and highly paid attorneys review the work of another set of experienced, competent, and highly paid attorneys is not reasonable."

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[75] *Id.* at 15.

[76] Def.'s Opp'n, App. 3.

[77] Pl.'s Rep. at 16.

Preseault, 52 Fed.Cl. at 680. The same logic applies to experts, thus the court accepts defendant's proposed $93,206.95 reduction of Dr. Just's fees. Plaintiff is entitled to a total of $205,279.41 in expert fees.

Lastly, defendant claims that plaintiff's "documentary support for most of its requested costs falls well-short"[78] of what is necessary to determine their reasonableness. This includes computerized research, photocopying, telephone, and courier charges. It is also argued that certain travel expenses were excessive. Plaintiff avers that during ten years of litigation it has amassed "bankers' boxes full of receipts and related documentation"[79] which would allow it to present more detailed documentation if necessary. Instead, it has chosen to list the type and purpose of each charge on a monthly basis, summarized on its bills. It is certain from the bills presented that the vast majority of the costs claimed were reasonable. It is also undeniable that plaintiff's approach has the benefit of judicial economy. "As with attorney's fees, the court will not second-guess counsel's decision to incur expenses it thought necessary to properly present its case. Since plaintiff had no assurance of winning, and therefore no assurance of recovering any of its costs, there is good reason to believe that plaintiff would not have incurred frivolous or unnecessary expenses, or allowed its lawyers to do so." *Florida Rock*, 9 Cl.Ct. at 291. The court recognizes, however, that some of plaintiffs expenses were incurred solely in pursuit of those claims that it lost. For this reason, a 10 percent offset is appropriate.

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[78] Def.'s Opp'n at 36.

[79] Pl.'s Rep. at 16-17.

Plaintiff is entitled to $193,682.45 in costs and expenses.

Conclusion

For the above-stated reasons, the Clerk is directed to enter judgment in favor of plaintiff in the amount of $6,165,297.72, plus simple interest at the 52-week treasury rate commencing from October 5, 1990, plus $2,414,744.81 in fees and expenses. Each side to pay its own court costs.

IT IS SO ORDERED.

APPENDIX E

CODE OF FEDERAL REGULATIONS

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER C—INTERSTATE TRANSPORTATION OF ANIMALS (INCLUDING POULTRY) AND ANIMAL PRODUCTS

PART 82—EXOTIC NEWCASTLE DISEASE IN ALL BIRDS AND POULTRY; PSITTACOSIS AND ORNITHOSIS IN POULTRY; POULTRY DISEASE CAUSED BY SALMONELLA ENTERITIDIS

Subpart B—Poultry Disease Caused by Salmonella Enteritidis Serotype Enteritidis

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§ 82.30 Definitions.

As used in connection with this subpart, the following terms shall have the meaning set forth in this section.

Administrator. The Administrator of the Animal and Plant Health Inspection Service or any individual authorized to act for the Administrator.

Animal and Plant Health Inspection Service (APHIS). The Animal and Plant Health Inspection Service of the United States Department of Agriculture.

Authorized laboratory. A laboratory approved by the Administrator to conduct tests in accordance with this subpart. The Administrator will approve an authorized laboratory only after consulting with the State animal health official in the State in which the

laboratory is located and after determining that the laboratory:

(1) Has technical personnel assigned to conduct the tests who have received training prescribed by the National Veterinary Services Laboratories;

(2) Uses reagents, media, and antigen approved by the National Veterinary Services Laboratories;

(3) Follows standard test protocols approved by the National Veterinary Services Laboratories;

(4) Meets check test proficiency requirements prescribed by the National Veterinary Services Laboratories; and

(5) Reports all test results to the State animal health official and APHIS.[1]

Certified Salmonella enteritidis serotype enteritidis Tested Free Flocks. Egg-type chicken breeding flocks that are classified "U.S. Sanitation Monitored" under the National Poultry Improvement Plan (NPIP), or meet the requirements of a State classification plan determined by the Administrator to be equivalent to the NPIP, in accordance with § 145.23(d) of this chapter.

Egg production flock. A flock maintained for the purpose of producing eggs for human consumption.

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[1] Training requirements, standard test protocols, and check test proficiency requirements prescribed by the National Veterinary Services Laboratories and the names and addresses of authorized laboratories can be obtained by writing to the Administrator, c/o Sheep, Goat, Equine, and Poultry Diseases Staff, Veterinary Services, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782.

Federal representative. An individual employed and authorized by the Federal government to perform the tasks required by this subpart.

Flock. All of the poultry on one premises, except that, at the discretion of a Federal representative, any group of poultry that is physically segregated from another group by barriers impervious to the spread of disease organisms and does not share common equipment or personnel with the other group may be considered as a separate flock.

Hatching eggs. Eggs in which young birds or poultry are allowed to develop.

Infected flock. A flock determined to be infected with Salmonella enteritidis serotype enteritidis in accordance with § 82.32(c) of this subpart.

Internal organs. All internal organs except for the lungs and organs of the gastrointestinal tract.

Interstate. From one State into or through any other State.

Move (moving, moved, movement). Shipped, offered for shipment to a common carrier, received for transportation or transported by a common carrier, or carried, transported, moved, or allowed to be moved by any means.

Multiplier breeding flock. A flock that is intended for the production of hatching eggs used for the purpose of producing progeny for commercial egg production.

Newly-hatched chicks. Chicks that have not been fed or watered for the first time.

Primary breeding flock. A flock composed of one or more generations that is maintained for the purpose of establishing or continuing multiplier breeding flocks for the ultimate purpose of commercial egg production.

State. Any State, the District of Columbia, Puerto Rico, Guam, the Northern Mariana Islands, the Virgin Islands of the United States, and any other territory or possession of the United States.

State representative. An individual employed in animal health work and authorized by a State or political subdivision of a State to perform the tasks required by this subpart.

Study flock. A flock determined in accordance with § 82.32(a) of this part to be a study flock, based on (1) a determination by a Federal representative or State representative through epidemiologic investigation that the flock is the probable source of disease in an outbreak of disease in poultry or humans caused by Salomella enteritidis serotype enteritidis, or (2) a determination by a Federal representative or State representative that the flock has received progeny from a primary breeding flock or multiplier breeding flock that has had a positive environmental sample in accordance with § 145.23(d)(1)(v) of this chapter, after the date of the last negative environmental sample for that primary breeding flock or multiplier breeding flock.

Test flock. A flock determined in accordance with § 82.32(b) of this part to have tested positive for Salmonella enteritidis serotype enteritidis in one or more manure or egg transport machinery sample, and designated for blood and internal organ testing in accordance with § 82.32(c) of this part.

§ 82.31 Applicability.

The regulations in this subpart apply only to primary and multiplier breeding flocks used for the purpose of producing progeny for commercial egg production, and to egg production flocks used for the

purpose of producing table eggs for sale or other distribution in interstate commerce.

§ 82.32 Determination that egg production flocks are study flocks, test flocks, or flocks infected with Salmonella enteritidis serotype enteritidis.

Only a Federal representative or a State representative may make a determination in accordance with this subpart that an egg production flock is a study flock, a test flock, or a flock infected with Salmonella enteritidis serotype enteritidis. The Federal representative or State representative shall notify in writing the person in control of the flock that his or her flock has been determined to be a study flock, a test flock, or an infected flock immediately after such a determination is made. At any time after such notification, the person in control of a Study Flock, Test Flock, or Infected Flock, upon request of a Federal representative or State representative, shall make available for review and copying all records of the shipment of poultry and poultry products to and from the flock.

(a) Study flocks. An egg production flock shall be determined to be a study flock if (1) a Federal or State representative determines through epidemiologic investigation that the flock is the probable source of disease in an outbreak of disease in humans or poultry caused by Salmonella enteritidis serotype enteritidis, or (2) a Federal representative or State representative determines that the flock has received progeny from a primary breeding flock or multiplier breeding flock that has had a positive environmental sample in accordance with § 145.23(d)(1)(v) of this chapter after the date of the last negative environmental sample for that primary breeding flock or multiplier breeding flock.

(b) Test flocks. A study flock shall be determined to be a test flock if manure samples and egg transport machinery samples are collected and tested in accordance with this paragraph and one or more of the samples tests positive for Salmonella enteritidis serotype enteritidis; except that, a study flock shall be determined to be a test flock if the person in control of the flock has refused to allow collection of samples in accordance with § 82.32(b)(1) within 48 hours of the time the person in control of the flock was notified in writing by a Federal representative or State representative that his flock was determined to be a study flock, or if the actions of the person in control of the flock prevent completion of collection of samples in accordance with § 82.32(b)(1) within 15 days of the time the person in control of the flock was notified by a Federal representative or State representative that his flock was determined to be a study flock. If a Federal or State representative determines through epidemiologic investigation that any flock is the probable source of disease in three or more outbreaks of disease in humans caused by Salmonella enteritidis serotype enteritidis, that flock shall be determined to be a test flock.

(1) Sample collection. A Federal representative or State representative shall initiate testing of each study flock by collecting the following samples for testing.

(i) Manure samples. The Federal representative or State representative shall collect one manure sample from each row of cages, using a sterile 4-inch by 4-inch gauze sponge for each sample. The manure sample shall be collected by wiping the manure scraper if a manure scraper is used on the row; otherwise, collect the manure sample by dragging the swab

along the manure pile beneath the cages. The gauze sponge used to collect manure samples from each row shall be placed in an 18-ounce whirl-pak plastic bag containing double strength skim milk, and the bag shall be marked with the location of the row from which the sample is taken.

(ii) Egg transport machinery samples. The Federal representative or State representative shall collect one egg transport machinery sample from each row of cages by wiping the egg transport belt and egg escalator, using a sterile 4-inch by 4-inch gauze sponge for each sample. The gauze sponge used to collect egg transport machinery samples from each row shall be placed in an 18-ounce whirl-pak plastic bag containing double strength skim milk, and the bag shall be marked with the location of the row from which the sample is taken.

(c) Infected flocks. A flock shall be determined to be an infected flock if the flock is tested in accordance with this paragraph and Salmonella enteritidis serotype enteritidis is recovered from the internal organs of one or more chickens in the flock. If Salmonella enteritidis serotype enteritidis is recovered from any manure sample or egg transport machinery sample from a study flock, but not from internal organs, the flock shall be retested in accordance with this paragraph beginning not less than 15 days after the date the first internal organ samples are collected, and if Salmonella enteritidis serotype enteritidis is not recovered from the internal organs of one or more chickens in the flock during this second testing, the flock will be determined not to be a study flock, a test flock, or an infected flock. An infected flock shall be considered infected until the flock has been retested in accordance with this paragraph without recovery

of Salmonella enteritidis serotype enteritidis from any samples. If an infected flock is depopulated, and a new flock is brought into the house or houses that contained the infected flock, the new flock shall be determined to be an infected flock unless the houses are cleaned and disinfected as follows between the time the infected flock is depopulated and the time the new flock arrives at the premises: all manure and litter must be removed from the house to an isolated area where there is no opportunity for dissemination of disease organisms; the walls, floors, and equipment in the house must be scrubbed with hot, soapy water and rinsed; and the walls, floors, and equipment in the house must be sprayed with a disinfectant which is registered by the U.S. Environmental Protection Agency as germicidal, in accordance with the label directions.

(1) Blood samples. The Federal representative or State representative shall collect blood samples from 300 chickens distributed randomly in each house, and also collect blood samples from any chickens that show clinical signs of infection with Salmonella enteritidis. Blood samples shall be collected in accordance with the procedures in §§ 147.1(a) and 147.3 of this chapter. The Federal or State representative shall band each chicken tested with a band bearing a unique number identifying the tube containing the blood sample from that chicken.

(2) Internal organ samples. The Federal representative or State representative shall collect a total of 60 chickens from each house and send the chickens to an authorized laboratory for testing of internal organs. The Federal representative or State representative shall include in this sample all chickens that reacted to the blood test in paragraph (c)(1) of

this section. If Salmonella enteritidis serotype enteritidis is recovered from any manure samples tested in accordance with paragraph (b)(1)(i) or egg transport machinery samples tested in accordance with paragraph (b)(1)(ii) of this section, the Federal representative or State representative shall collect additional chickens from the rows that supplied the manure or egg transport machinery samples from which Salmonella enteritidis serotype enteritidis was recovered, to bring the total number of chickens from each house submitted for internal organ testing to 60.

(d) Test methods for samples. Blood samples shall be tested either at the flock premises or at an authorized laboratory, and all other samples shall be sent for testing to an authorized laboratory. Blood samples shall be tested using a stained-antigen, rapid, whole blood test, in accordance with § 147.3 of this chapter. Manure, egg transport machinery, and internal organ samples shall be sent for testing to an authorized laboratory, where they shall be cultured for identificiation of Salmonella enteritidis serotype enteritidis as follows: (1) Manure and egg transport machinery samples. Place each sample in approximately 10 times its volume of Hajna TT or Mueller-Kauffman tetrathionate selective enrichment broth, and incubate at 42 degrees C for 24 hours. Use each enriched sample to inoculate an agar plate of Brilliant green agar supplemented with novobiocin, and a supplemental medium such as XLD if so desired, and incubate the plates at 37 degrees C for 24 hours. Inoculate at least 3 Salmonella-suspect colonies from each plate to slants of triple-sugar iron (TSI) agar and lysine-iron (LI) agar, and incubate at 37 degrees C for 24 hours. Cultures showing typical reactions on TSI or LI or both shall be screened with Group D antiserum. Send all Group D isolates to the National

Veterinary Services Laboratories for further characterization. (2) Internal organ samples. Place each sample in approximately 10 times its volume of Hajna TT or Mueller-Kauffman tetrathionate selective enrichment broth, and incubate at 42 degrees C for 24 hours. Use each sample to inoculate an agar plate of Brilliant green agar supplemented with novobiocin, and a supplemental medium such as XLD if so desired, and incubate the plates at 37 degrees C for 24 hours. Inoculate at least 3 Salmonella-suspect colonies from each plate to slants of TSI agar and LI agar, and incubate at 37 degrees C for 24 hours. Cultures showing typical reactions on TSI or LI or both shall be screened with Group D antiserum. Send all Group D isolates to the National Veterinary Services Laboratories for further characterization.

(e) Release from infected flock status. A Federal or State representative shall determine that an infected flock is no longer an infected flock, and shall notify in writing the person in control of the flock of that determination, after the Federal or State representative determines that the flock has retested negative as follows: (1) Manure samples and egg transport machinery samples have been collected and tested in accordance with paragraph (b) of this section with no recovery of Salmonella enteritidis serotype enteritidis, and (2) internal organ samples have been collected and tested in accordance with paragraph (c) of this section with no recovery of Salmonella enteritidis sertotype enteritidis.

§ 82.33 Interstate movement of articles from test flocks and infected flocks.

(a) Eggs may be moved interstate from a test flock or an infected flock only for pasteurization, and only if: (1) a permit has been obtained for the interstate

movement in accordance with § 82.35 of this part, and (2) the eggs are moved in a completely enclosed compartment of a vehicle that has had a seal applied to it by a Federal or State representative immediately prior to movement.

(b) Live chickens may be moved interstate from a test flock or an infected egg production flock interstate only if: (1) A permit has been obtained for the interstate movement in accordance with § 82.35 of this part; (2) the chickens are moved interstate to a Federally inspected slaughtering establishment; and (3) the chickens are slaughtered within 24 hours of arrival at the Federally inspected slaughtering establishment.

(c) Cages, coops, containers, troughs, and other equipment may be moved interstate from a test flock or an infected egg production flock interstate only if: (1) A permit has been obtained for the interstate movement in accordance with § 82.35 of this part; (2) the equipment is made of hard plastic or metal; (3) the equipment has been cleaned and disinfected in accordance with § 71.7 of this chapter; and (4) the equipment was inspected by a Federal or State representative[1] after it was cleaned but before it was disinfected, and then was disinfected in the presence of a Federal or State representative.

(d) Manure may be moved interstate from a test flock or an infected egg production flock interstate

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[1] The location of Federal or State representatives can be obtained by writing to the Administrator, c/o Sheep, Goat, Equine, and Poultry Diseases Staff, Veterinary Services, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782.

only if: a permit has been obtained for the interstate movement in accordance with § 82.35 of this part; the containers or trailers used to move the manure are filled and covered inside the building housing the flock; the wheels and exposed surfaces of the vehicles used to move the manure are free of manure at the time the manure leaves the premises of the flock; and the manure is moved interstate for one of the following purposes: (1) burial; (2) spreading and turning under on fields not used for grazing or poultry production; or (3) composting in a covered compost heap for a period of at least one month.

§ 82.34 Interstate movement of hatching eggs and newly-hatched chicks.

No hatching eggs or newly-hatched chicks from egg-type chicken breeding flocks may be moved interstate unless they are classified "U.S. Sanitation Monitored" under the National Poultry Improvement Plan (NPIP), or meet the requirements of a State classification plan determined by the Administrator to be equivalent to the NPIP, in accordance with § 145.23(d) of this chapter. Flocks which meet this requirement are designated Certified Salmonella enteritidis serotype enteritidis Tested Free Flocks.

§ 82.35 Issuance of permits.

Permits required by this part may be obtained by applying in writing to a Federal representative.[1] The application shall specify the following: the name and mailing address of the person applying for the permit; the name and mailing address of the person who will receive the poultry or other items; the street addresses of both the origin and destination of the shipment;

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[1] See Footnote 1 to § 82.33 of this part.

the number and types of poultry and other items to be moved; and the reason for their movement. A permit will be issued after the Federal representative determines that the equivalent has met all applicable requirements of this chapter.

§ 82.36 Denial and withdrawal of permits.

(a) Denial. If a Federal representative denies a request for a permit, he or she will send the applicant a written notice of the denial, explaining why the permit was denied.

(b) Withdrawal. If a Federal representative determines that the holder of a permit is violating either the regulations or a condition specified in the permit, he or she may withdraw the permit by notifying the holder of the permit of its withdrawal, orally or in writing. If the notice was oral, a written notice of the withdrawal, explaining why the permit was withdrawn, will follow.

(c) Appeals. Denial or withdrawal of a permit may be appealed in writing to the Administrator within 10 days after receipt of the written notice of denial or withdrawal. The appeal must tell the Administrator what material facts are in dispute. A hearing will be held with respect to the merits or validity of the denial or withdrawal, in accordance with rules of practice which shall be adopted by the Administrator for the proceeding; however, the withdrawal or denial shall continue in effect pending the completion of the proceeding, and any judicial review thereof, unless otherwise ordered by the Administrator.

No. 09-342

In the Supreme Court of the United States

ROSE ACRE FARMS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, for purposes of regulatory takings analysis under the Fifth Amendment, the court of appeals correctly analyzed the "economic impact" and the "character" of regulations promulgated by the United States Department of Agriculture in 1990 and 1991 to control the spread of *Salmonella enteritidis* in eggs.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-49a) is reported at 559 F.3d 1260. An earlier opinion of the court of appeals (Pet. App. 50a-90a) is reported at 373 F.3d 1177. The opinion of the Court of Federal Claims (CFC) (Pet. App. 91a-119a) is unreported. An earlier opinion of the CFC (Pet. App. 120a-180a) is reported at 55 Fed. Cl. 643.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 2009. A petition for rehearing was denied on May 20, 2009. On August 3, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 17, 2009, and

the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. *Salmonella enteritidis* (salmonella) is a bacterium normally found in the gastrointestinal tract of birds and farm animals. Pet. App. 125a & n.5. When ingested by humans, salmonella can cause nausea, vomiting, abdominal cramps, diarrhea, fever, headache, and sometimes death. *Id.* at 125a n.5; C.A. App. 212-213.[1] Approximately 15%-20% of those who have been diagnosed with salmonellosis, the disease caused by salmonella, require hospitalization. *Id.* at 301.

In the late 1980s, the Centers for Disease Control (CDC) determined that human health problems linked to salmonella exposure were increasing. Pet. App. 4a. With respect to transmission involving chicken eggs, before the 1980s, salmonella had been found only on the outside of eggs. C.A. App. 280. After an investigation into a 1986 salmonella outbreak during which 3300 people became ill, however, the CDC concluded that salmonella also could be transmitted from hens to the inside of eggs. *Id.* at 223, 225-226, 245-249, 279-281, 287-296.

In 1990, the United States Department of Agriculture (USDA) promulgated interim regulations to address the danger that salmonella-contaminated eggs posed to humans. Pet. App. 4a-5a. Under the interim regulations, a farm identified as a probable source of salmonella-contaminated eggs was designated as a "study flock" and subject to environmental testing. *Id.* at 5a (quoting 9 C.F.R. 82.32 (1991)). If one or more environmental samples tested positive, the farm was

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[1] All references to "C.A. App." refer to the appendix filed in the court of appeals in No. 03-5103.

designated as a "test flock" and its eggs could not be sold in interstate commerce for sale as raw "table eggs," though the eggs could still be sold for uses that entailed pasteurization. *Id.* at 5a-6a & n.2.

Under the interim regulations, "[s]pecified numbers of the hens in test flocks were also required to undergo blood and internal-organ testing. A test flock was designated an 'infected flock' if the organs of one or more hens tested positive for [salmonella]." Pet. App. 54a (citations omitted). Eggs from an "infected flock" were subject to the ban on interstate shipment for use as table eggs until either (1) the premises or hens tested negative for salmonella, or (2) the poultry houses containing the infected hens were depopulated, cleaned and disinfected, and inspected by USDA inspectors. 9 C.F.R. 82.32(c), 82.33(a) (1991); see Pet. App. 54a-55a.

On January 30, 1991, the USDA published its final salmonella regulations. See 56 Fed. Reg. 3730. The final rules incorporated the requirements set forth above. The final rules also made clear that restrictions on interstate sale could be imposed on a henhouse-by-henhouse basis, and thus could apply to some but not other henhouses on a single farm. The final regulations provided, however, that so long as some henhouses on a particular farm were subject to the sale restrictions, the USDA would continue to monitor other houses on the same farm, including those that had tested negative for the presence of salmonella. See Pet. App. 55a, 128-129a.

2. In 1990, three separate outbreaks of salmonella contamination, which sickened approximately 450 people in three States, were traced back to eggs from henhouses on three different farms owned by petitioner in Indiana. Pet. App. 130a-132a. In response, the USDA imposed sales restrictions and commenced testing. *Id.* at 131a-133a. The last restrictions were lifted in 1992. *Id.* at 8a. Over the 25 months during which houses on

one or more of its farms were subject to USDA restrictions, petitioner sold for uses involving pasteurization approximately 700 million eggs that otherwise could have been sold as table eggs. *Id.* at 135a.

3. In December 1990, petitioner filed suit in the United States District Court for the Southern District of Indiana, asserting a variety of challenges to the USDA regulations. C.A. App. 92. The Seventh Circuit ultimately sustained the regulations, and this Court denied a petition for a writ of certiorari. *Rose Acre Farms, Inc.* v. *Madigan*, 956 F.2d 670, cert. denied, 506 U.S. 820 (1992). As relevant here, the court of appeals rejected petitioner's argument that the regulations were invalid because the USDA had made no provision for compensating persons who suffered pecuniary losses as a result of the regulatory restrictions, explaining that the CFC could award relief if either the Constitution or a federal statute were found to require compensation. *Id.* at 672-674.

4. Petitioner filed suit in the CFC, which held that a taking had occurred and awarded compensation. Pet. App. 120a-180a. A unanimous panel of the Court of Appeals for the Federal Circuit vacated the CFC's judgment and remanded for reconsideration under *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978) (*Penn Central*). See Pet. App. 50a-90a. This Court denied petitioner's petition for a writ of certiorari (No. 04-1149), as well as the government's conditional cross-petition for a writ of certiorari (No. 04-1311). See 545 U.S. 1104. On remand, the CFC again found that a taking had occurred and awarded petitioner approximately $5.4 million in compensation plus approximately $3.3 million in fees and expenses. Pet. App. 91a-119a.

5. A unanimous panel of the court of appeals reversed. Pet. App. 1a-49a. The court explained that "[t]he common touchstone of regulatory takings prece-

dent is 'to identify regulatory actions that are functionally equivalent to the classic taking in which the government directly appropriates private property or ousts the owner from his domain.'" *Id.* at 12a (quoting *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005)). The court of appeals further explained that, outside certain narrow contexts not at issue here, "a court conducts a factual inquiry based on the well-known *Penn Central* factors to evaluate whether the government's regulation rose to the level of a taking," including "(1) the economic impact of the action on the claimant, (2) the effects of the governmental action on the reasonable investment-backed expectations of the claimant, and (3) the character of the governmental action." *Id.* at 12a-13a (citing *Penn Central*, 438 U.S. at 124).

a. The court of appeals began with "[t]he economic impact of the government's regulatory action," Pet. App. 13a, and determined that that factor favored the government, *id.* at 31a. The court concluded that the relevant property had declined in value only by approximately 10% as a result of the USDA's regulatory program, and it observed that petitioner had "point[ed] to no case in which a court has found a diminution in value of 10% as being severe or as favoring a taking." *Ibid.*

i. The court of appeals concluded that the CFC and petitioner's expert witness had erred in defining "the parcel of allegedly taken property." Pet. App. 22a; see *id.* at 22a-25a & n.5. Reiterating a conclusion from its initial opinion, the court of appeals stated that "the relevant parcel" consisted of all of the eggs produced from "the three farms as a whole rather than each individual hen house" during the relevant period. *Id.* at 15a. Although "the interstate and intrastate transport *restrictions* were applied ultimately to individual houses," the court noted in its earlier opinion that both "the tracebacks that resulted in the 'study flock' designation" and

the subsequent environmental testing that resulted in "the identification of the restricted 'test houses'[] were * * * directed to each farm as a whole," and that, under the regulations, "as long as any one house on any farm was designated as an 'infected house,' all other houses on that farm were required to undergo testing for purposes of monitoring." *Id.* at 73a. The court of appeals determined that "because the regulations at issue applied to each farm as a whole, their economic impact cannot be measured by considering the restricted houses alone." *Ibid.*

ii. The court of appeals also determined that, in assessing the impact of the USDA's regulations, the CFC erred in "looking only at the percentage decrease in profits" that petitioner experienced during the relevant period. Pet. App. 16a. The court explained that "the vast majority of [regulatory] takings jurisprudence examines, under *Penn Central*'s economic impact prong, not lost profits but the lost value of the taken property." *Ibid.*; see *id.* at 16a-17a. The court of appeals also identified a variety of problems with "sole reliance" on a lost-profits measure, including the CFC's failure to identify "some benchmark standard" against which to compare the amount of lost profits, *id.* at 17a-18a, as well as the difficulty (which the CFC had not acknowledged) "in comparing any given diminution of return calculation with another diminution in return calculation," *id.* at 18a; see *id.* at 18a-21a (providing examples of how exclusive use of a diminution in profits approach can generate "incongruent results"). The court of appeals acknowledged that "unfortunate dicta" in its previous opinion had "suggested that the diminution in return might be the more appropriate metric," but it concluded that those statements "stemmed from a framing of the issues less clear than presently before the court." *Id.* at 22a. The court of appeals observed that the "property" in

question was "now clearly defined as the diverted eggs themselves," which were "a discrete asset, the market value of which is readily ascertainable." *Id.* at 30a. Under the circumstances, the court of appeals stated that "it was clear error to place sole reliance on the diminution in return metric." *Ibid.* The court emphasized, however, that it was not holding "that, in other circumstances, a factfinder may never rely solely on diminution in return to assess the economic impact of [a] regulation," and the court stated that it "need not decide whether the [CFC] should have looked only at diminution in value without consideration of diminution of return." *Id.* at 30a n.7.

b. Reiterating another conclusion from its previous decision, the court of appeals concluded that *Penn Central*'s "reasonable investment-backed expectations" factor favored petitioner. Pet. App. 31a-32a. In its previous opinion, the court of appeals acknowledged that "the poultry industry in general is highly regulated" and that there are "long-standing regulations aimed at preventing the spread of communicable diseases in birds and poultry." *Id.* at 74a. The court determined, however, that the salmonella "regulations were more than an extension of comparable regulations to a new disease," because "[t]hey were grounded in new scientific understanding (i.e., that salmonella could be transmitted from hen to egg) and were unprecedented in their reliance on environmental and hen testing." *Id.* at 74a-75a.

c. Finally, the court of appeals re-examined *Penn Central*'s "character" factor and concluded that it favored the government. Pet. App. 32a-45a. The court examined this Court's intervening decision in *Lingle*, and concluded that, under *Lingle*, it could "no longer ask whether the means chosen by government advance the ends or whether the regulation chosen is effective in curing the alleged ill." *Id.* at 36a. The court of appeals

also stated that, under *Lingle*, it "must consider 'the actual burden imposed on property rights, or how that burden is allocated,'" as well as "the *magnitude or character of the burden* a particular regulation imposes upon private property rights." *Id.* at 37a. The court of appeals observed that "the [salmonella] regulations did not single out [petitioner]," but rather "broadly applied to almost any egg producer in the United States." *Id.* at 38a. The court further noted that "[t]he [salmonella] regulations as enacted targeted no single egg producer unless [salmonella]-infected eggs were traced back to a particular farm and that farm tested positive." *Ibid.*

The court of appeals also concluded that *Lingle* had not modified "a substantial body of case law" that had considered the "public health and safety aspect of" a regulation in assessing a regulatory takings claim. Pet. App. 39a, 42a-43a (citing cases). The court reviewed the Nation's long history of food regulations, see *id.* at 40a-42a, and stated that restrictions on "uses of personal property * * * directed at the protection of public health and safety" are "the type of regulation in which the private interest has traditionally been most confined and governments are given the greatest leeway to act without the need to compensate those affected by their actions." *Id.* at 44a (citing cases). The court determined that "the government's act [of] protecting the public health by identifying diseased eggs and forcing their owner to remove them from the table market[] weigh[ed] strongly against finding a taking here," and it rejected petitioner's assertion that, after *Lingle*, it could "only consider the public health aspect of the [salmonella] regulations in a diminished and optional role." *Id.* at 43a-44a.

ARGUMENT

Petitioner's challenges to the court of appeals' unanimous decision lack merit and do not warrant further review. Petitioner is in the ongoing business of introducing billions of eggs annually into the Nation's food supply. It is uncontroverted that eggs originating from henhouses at three different farms operated by petitioner were connected to salmonella outbreaks that sickened 450 people in three States. In response, the USDA imposed temporary measures that prevented petitioner from selling eggs produced from the contaminated facilities in the interstate market for raw table eggs until it adequately remedied the contamination, while leaving petitioner free to continue selling eggs from non-contaminated facilities and to sell eggs from the contaminated facilities for uses that involved pasteurization. The court of appeals correctly held that petitioner is not entitled to compensation under the Fifth Amendment as a result of those temporary measures designed to protect public health. The court of appeals' decision also does not conflict with any decision of another court of appeals or state court of last resort. Further review is thus unwarranted.

1. Petitioner first contends (Pet. 14-21) that the court of appeals erred in determining that the relevant "denominator" for purposes of assessing *Penn Central*'s economic impact prong was the full quantity of eggs produced by the three farms that contained the contaminated henhouses rather than simply those eggs that originated from the contaminated henhouses themselves. Pet. 19-20. The contention does not merit further review.

a. The court of appeals' decision is correct. "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether

rights in a particular segment have been entirely abrogated." *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 130 (1978). Rather, in "compar[ing] the value that has been taken from the property with the value that remains in the property," this Court has recognized that "the aggregate must be viewed in its entirety." *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 497 (1987) (*Keystone Bituminous*) (citation omitted). "To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question." *Concrete Pipe & Prods. of Cal., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 644 (1993) (*Concrete Pipe*).

Petitioner errs in asserting that the court of appeals applied the sort of "extreme * * * and unsupportable * * * view of the relevant" parcel that this Court criticized in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992). See Pet. 20 (citation omitted). The analysis that the Court disapproved in *Lucas* was one that focused on the "total value of the taking claimant's other holdings in the vicinity." 505 U.S. at 1017 n.7. But the court of appeals' holding that the relevant parcel included all of the eggs produced on the three farms during the restriction period was not based simply on unity of ownership or the mere physical proximity of other portions of the farms to the infected houses. Rather, the court's delineation of the parcels was based on the fact that, under the salmonella regulations, the farm as a whole was treated as the relevant unit of regulation because of the potential for salmonella to spread throughout the farm. See Pet. App. 73a (explaining that although the "*restrictions* were applied ultimately to individual houses, * * * the tracebacks that resulted in the 'study flock' designation[s] * * *

were, in accordance with the interim and final regulations, directed to each farm as a whole" and that, under the regulations, "as long as any one house on any farm was designated as an 'infected house,' all other houses on the farm were required to undergo testing for purposes of monitoring") (quoting 9 C.F.R. 82.38 (1992)). The court's approach is further supported by the fact that, during the period that the three farms were subject to regulatory restrictions, individual henhouses moved in and out of "infected" status depending on whether salmonella contamination had spread from one house to another and whether petitioner had depopulated and disinfected a particular henhouse. C.A. App. 144-181.[2]

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[2] Petitioner's assertion (at 20) that the court of appeals should have looked only to those eggs produced from the affected henhouses also overlooks the impact of the USDA's regulatory efforts on petitioner's broader business operations. By minimizing the risk that contaminated eggs will cause harm to human health, those efforts could reasonably be expected to increase consumer confidence and thus support the national market for table eggs. See 55 Fed. Reg. 5577 (1990) (USDA forecasts that, "[i]f not controlled, [salmonella] * * * will cause adverse economic impact on the table egg industry by * * * decreasing demand for eggs due to lack of consumer confidence that eggs are a safe food."). Petitioner is a major participant in that national market, Pet. App. 82a, and, even during the restriction period, petitioner's three farms affected by the salmonella restrictions continued to sell a majority of the eggs they produced on the raw table egg market. See C.A. App. 240, 242-244. In assessing the economic impact of the salmonella regulations, a court should not ignore the fact that regulatory measures reasonably designed to reduce the risk of salmonella contamination and consequent adverse health effects on consumers could logically be expected to increase the marketability of the table eggs that petitioner continued to sell, both from the three particular farms at issue here and from other farms. But cf. Pet. App. 31a (declining to consider any "offsetting benefits" of the USDA's regulations because the government "points to no economic data in the record" to quantify the precise extent of those benefits).

Petitioner also errs in suggesting (Pet. 20) that the court of appeals' decision makes "the Fifth Amendment mean[] something different depending on whether a business is large or small." The court of appeals' analysis did not turn on the size of petitioner's overall business but rather on the degree to which particular units or parcels of property had been impaired. And petitioner's further suggestion that it has been treated unfairly because (it asserts) the result of the taking analysis might have been different had it "owned only the restricted houses," *ibid.*, is simply a general attack on the principle that, "in regulatory takings cases," a court "must focus on 'the parcel as a whole.'" *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331 (2002) (*Tahoe-Sierra*) (quoting *Penn Central*, 438 U.S. at 130-131).

b. Petitioner asserts that lower courts "are divided over how to" define the relevant parcel for purposes of *Penn Central*'s economic impact factor and have "reached inconsistent results" with respect to that question. Pet. 15-16. Petitioner does not directly assert, however, that the court of appeals' decision in this case conflicts with the decision of another court of appeals or a state court of last resort, nor does it describe the facts or holdings of any of the cases that it cites (see Pet. 16-18).[3] As petitioner acknowledges, "takings questions are

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[3] Petitioner asserts (at 18) that "disagreement persists * * * *within* the Federal Circuit." But none of the judges on the unanimous panel of the court of appeals perceived any such conflict, and the court of appeals denied petitioner's petition for rehearing en banc without recorded dissent. In any event, an intracircuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Petitioner also suggests that the court of appeals' decision conflicts with a decision from a state intermediate appellate court. See Pet. 18 (citing *Twain Harte Assocs., Ltd.* v. *County of Tuolumne*, 265 Cal.

'essentially ad hoc, factual inquiries.'" Pet. 19 (quoting *Penn Central*, 438 U.S. at 124). It is thus impossible for petitioner to establish a conflict that would warrant this Court's review simply by citing a series of decisions without providing any description of their particular facts and circumstances.

In any event, there is no conflict with any of the decisions that petitioner associates with what it characterizes as the "[r]easonable [e]xpectation [s]chool" or the "[g]overnment [c]onduct [s]chool." Pet. 17 (emphasis deleted); see Pet. 17-18. In *District Intown Properties Ltd.* v. *District of Columbia*, 198 F.3d 874, 880 (1999), cert. denied, 531 U.S. 812 (2000), the D.C. Circuit determined that nine contiguous lots should be treated as one parcel, even though the lots had been subdivided. In *American Savings & Loan Ass'n* v. *County of Marin*, 653 F.2d 364, 371 (1981), the Ninth Circuit concluded that, until a developer submitted a development plan, it was "impossible to determine whether" two pieces of real property "ought to be treated as one parcel or as two." In *Machipongo Land & Coal Co.* v. *Commonwealth*, 799 A.2d 751, 768-769, cert. denied, 537 U. S. 1002 (2002), the Supreme Court of Pennsylvania did not identify the relevant parcel, but instead remanded to a lower court for further analysis. The only issue on appeal in *Vulcan Materials Co.* v. *City of Tehuacana*, 369 F.3d 882 (5th Cir. 2004), was the property owner's "takings claim under the *Texas* Constitution," *id.* at 884 (emphasis added), and the Fifth Circuit's limited holding was that, in defining the relevant parcel, it would con-

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Rptr. 737, 744-745 (Ct. App. 1990)). Such a conflict would not warrant this Court's review. In any event, there is no conflict, because that case involved an alleged taking of real property, and the court simply determined that, given the particular facts and circumstances of that case, a 1.7-acre plot of land constituted the relevant parcel for purposes of a takings analysis. See *id.* at 744-746.

sider only property that the relevant government entity had "authority to regulate," *id.* at 889; see *id.* at 889-891. And *Department of Agriculture & Consumer Services* v. *Mid-Florida Growers, Inc.*, 521 So. 2d 101, 104 (Fla.), cert. denied, 488 U.S. 870 (1988), did not address any questions about the definition of the relevant parcel for purposes of a regulatory takings analysis. Rather, that decision addressed a certified question about whether the State of Florida could destroy healthy, but suspect, citrus plants without paying compensation. *Id.* at 102.

c. Even if questions concerning the proper approach to a *Penn Central* economic impact analysis otherwise warranted this Court's review, this case would be an unsuitable vehicle for considering them. As the phrase suggests, the "parcel as a whole" rule (see *Tahoe-Sierra*, 535 U.S. at 331) is most often applied in cases involving land-use regulation. Petitioner's complaint, however, is not with any restriction placed on the use of its land, but with temporary limits placed upon the interstate sale of personal property (eggs) for commercial purposes in an industry that is heavily regulated to protect public health and safety. Although "parcel as a whole" principles may inform the takings inquiry in cases involving personal as well as real property in appropriate circumstances, the constitutional rules developed in one context will often not be readily applicable to the other. Cf. *Lucas*, 505 U.S. at 1027-1028 ("[I]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [a property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless.").

The temporary nature of the pertinent restrictions further underscores the idiosyncratic nature of the "economic impact" question presented here. Thus, although petitioner's costs exceeded its income with respect to

eggs from three of its farms during the 25-month period that those farms were subject to USDA-imposed restrictions, petitioner presumably experienced a profit on its sales of eggs from those farms both before and after the restricted period. See note 2, *supra*. Those profits, in turn, could be expected to reflect the long-term *beneficial* effects of USDA's program, as well as the risk inherent in a business of this sort that its operations might on occasion be subject to special restrictions to protect public health and safety. A narrow focus on economic impact only during the temporary period in which restrictions were in place would ignore the broader commercial context in which petitioner operates. These and other dissimilarities between this case and the setting in which the "parcel as a whole" analysis typically is applied provide additional reasons for this Court to deny the petition for a writ of certiorari.

2. Petitioner also asserts (Pet. 21-24) that the court of appeals used an "[im]proper metric for assessing economic impact for a going business concern like [petitioner]." Pet. 24. Specifically, petitioner asserts that the court of appeals erred in applying a "diminution in value" approach rather than one focusing on "the percentage [of] decrease in profits." Pet. 23 (citation omitted). That contention does not merit further review.

Petitioner does not assert that the court of appeals' holding on this point conflicts with the decision of another court of appeals or a state court of last resort. Instead, petitioner contends (Pet. 22-23) that the court of appeals' decision conflicts with its own previous decisions, including the first panel decision in this case. None of the judges on the unanimous panel that ruled against petitioner (including Judge Michel, who authored both panel decisions) perceived any such conflict, and the court of appeals denied petitioner's petition for rehearing en banc without recorded dissent. Moreover,

an intracircuit conflict would not warrant this Court's review in any event. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).[4]

The court of appeals' decision to apply a diminution in value approach in this case also was correct. As the court of appeals explained, when this Court "has assessed the economic impact of a regulatory taking, it has talked almost exclusively in terms of lost value rather than lost profits." Pet. App. 17a (citing cases).[5] Petitioner does not address any of those decisions, nor does it provide any response to the court of appeals' detailed explanation (see *id.* at 16a-31a) of why the CFC's exclusive reliance on a diminution-in-profits approach was inappropriate in this case.

The regulatory measures at issue here, moreover, did not require the destruction of the eggs in question. Rather, those measures simply required that the eggs be sold only for uses entailing pasteurization, which would remove the risk of salmonella infection, rather than for use as table eggs. That restriction reduced the overall value of eggs sold from three farms by only approximately 10%. See Pet. App. 15a, 31a, 49a. As the

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[4] Although the Federal Circuit is generally "the sole appellate court that hears takings claims against the [Federal] Government," Pet. 23, both state and other federal circuits may entertain takings claims against state and local governments and thus may be called on to apply *Penn Central* in circumstances that are analogous to this case.

[5] The decisions cited by petitioner (Pet. 21-22) are not to the contrary. This Court's statement in *Penn Central* that the plaintiff was able "to obtain a 'reasonable return' on its investment" did not focus on the profits that the plaintiff might have made in the absence of the relevant regulation. 438 U.S. at 136. Of the other four of this Court's decisions cited by petitioner, three pre-date *Penn Central* and thus do not address the proper application of *Penn Central*'s economic impact prong. The fourth decision—*First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304 (1987)—did not discuss *Penn Central*'s economic impact prong.

court of appeals pointed out, no case has found a taking based on such a relatively minor reduction in value. *Id.* at 31a.

3. Finally, petitioner argues (Pet. 24-33) that the court of appeals erred in analyzing the "character" of the salmonella regulations. That contention also does not merit further review.

a. The court of appeals' analysis of the "character" factor was correct and consistent with this Court's decisions. In *Penn Central*, this Court explained that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124 (citation omitted).

As the court of appeals explained, this Court's pre- and post-*Penn Central* decisions establish that the public health and safety character of a challenged regulation is relevant to any takings inquiry. See Pet. App. 42a-43a, 75a-76a (citing *Miller* v. *Schoene*, 276 U.S. 272, 279-280 (1928); *Mugler* v. *Kansas*, 123 U.S. 623, 668 (1887); and *Keystone Bituminous*, 480 U.S. at 488-492). "[N]o individual has a right to use his property so as to * * * harm others," *id.* at 492 n.20, and the regulations at issue in this case were designed to protect the public from serious health risks posed by a particular food product following the traceback to petitioners' farms of salmonella-contaminated eggs. Accordingly, it was reasonable to impose upon participants in the relevant industry the costs inherent in protecting the public from those dangers, especially when, as here, the source had been traced to petitioner. See *Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 225-226 (1986) (rejecting takings liability when employers withdrawing from a pension fund were assessed an amount to remedy the

harms caused by their actions). Indeed, as the court of appeals explained, restrictions on "the selling of food for human consumption" are "the type of regulation in which the private interest has traditionally been most confined and governments are given the greatest leeway to act without the need to compensate those affected by their actions." Pet. App. 44a (citing cases).

Petitioner errs in asserting that this Court's decision in *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), "called into question the ongoing role that the 'character' factor from the *Penn Central* test should play." Pet. 24. *Lingle* raised no questions about the proper application of the *Penn Central* test for assessing regulatory takings claims. Instead, *Lingle* disavowed language in previous decisions that had "been read to announce a stand-alone regulatory takings test that [was] wholly independent of *Penn Central* or any other test." *Lingle*, 544 U.S. at 540. The Court emphasized that its decision "d[id] not require [it] to disturb any of [its] prior holdings," *id.* at 545, and *Lingle* did not purport to overrule or modify any portion of *Penn Central*. Accordingly, the court of appeals correctly determined that "*Lingle* neither addressed nor disturbed *Penn Central*'s consideration of the health and safety aspect of the regulations." Pet. App. 39a.

b. The court of appeals' analysis of the "character" factor also did not result in a decision that conflicts with the decisions of state courts of last resort cited by petitioner. See Pet. 25. None of those decisions held that *Lingle* bars consideration of a regulation's public health and safety purpose. In *Buhmann* v. *State*, 201 P.3d 70 (2008), cert. denied, 130 S. Ct. 394 (2009), the Supreme Court of Montana rejected a regulatory takings claim after concluding that the "character" factor weighed in favor of the government and against the plaintiff. *Id.* at 94. Although the court stated without explanation or

elaboration that it "disagree[d] with" a portion of the trial court's analysis of the character factor in that case "because it inquired into the purposes and propriety of [the regulation in question] in a manner foreclosed by *Lingle*," *id.* at 92, the court had previously described the inquiry that *Lingle* "foreclose[d]" as one into whether the regulation was "*effective* in achieving any of the objectives or concerns it was designed to address," *id.* at 77 n.2 (emphasis added).

The court of appeals' decision also does not conflict with *Wensmann Realty, Inc.* v. *City of Eagan*, 734 N.W.2d 623 (Minn. 2007) (*Wensmann*). *Wensmann* made clear that "the relevant considerations [in conducting *Penn Central*'s "character" inquiry] may vary depending on the circumstances of the case," and, in that case, the Supreme Court of Minnesota considered the underlying purpose of the government-imposed restrictions on private property, observing that they "seem[ed] aimed at things that have been considered governmental functions." *Id.* at 639-640. *Wensmann* thus did not hold that a court's inquiry into the character of a government regulation may not include consideration of the regulation's purpose of protecting public health and safety. Finally, as petitioner acknowledges (Pet. 25), *Mann* v. *Georgia Department of Corrections*, 653 S.E.2d 740 (Ga. 2007), expressly assumed for purposes of its decision "that the substantiality of the public purpose advanced by a regulation *is* still pertinent to a takings challenge," *id.* at 745 (emphasis added), but found in favor of the plaintiff with respect to one particular regulation based on its assessment of the economic impact and investment-based expectations prongs of the *Penn Central* test, *ibid.*

4. Further review also is unwarranted because, contrary to the court of appeals' conclusion (see Pet. App. 74a-75a), *Penn Central*'s "reasonable investment-backed

expectations" factor also favors the government in this case.[6] As the court of appeals explained, the sale of food has long been subject to stringent laws to protect public health and safety. See *id.* at. 40a-43a. And since 1970, Congress has sought to protect the health of human consumers by mandating federal inspection of egg products moving in interstate commerce. See Egg Products Inspection Act, Pub. L. No. 91-597, § 5(a), 84 Stat. 1624 (21 U.S.C. 1034(a)); 21 U.S.C. 1033(a)(1). Given the long-standing regulatory history in this area, petitioner could not reasonably have anticipated that it would be allowed to transport in interstate commerce eggs that posed an unacceptable risk of serious harm to human health.[7]

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[6] When petitioner previously sought a writ of certiorari following the court of appeals' first decision in this case, the United States filed a conditional cross-petition for a writ of certiorari (No. 04-1311) with respect to the court of appeals' treatment of the "reasonable investment-backed expectations" factor. At that point, however, there was no final judgment, because the court of appeals had vacated the CFC's decision and remanded for further proceedings. Pet. App. 90a. Now, in contrast, the United States has a final judgment in its favor, and "[i]t is well accepted" that a respondent that does not "seek to modify the judgment below * * * may, without filing a * * * cross-petition, . . . rely upon any matter appearing in the record in support of the judgment." *Union Pac. R.R.* v. *Brotherhood of Locomotive Eng'rs Gen. Comm. of Adjustment*, No. 08-604 (Dec. 8, 2009), slip op. 10-11 (internal quotation marks and citation omitted).

[7] The gravamen of petitioner's takings claim is that only a small percentage of its eggs were salmonella-contaminated during the relevant period, and that the government had no regulatory justification for restricting the sale of "healthy eggs." Pet. 2. In its first decision, however, the court of appeals rejected as clearly erroneous the CFC's finding that egg testing was a feasible means of assessing the extent of salmonella contamination during the relevant period. Pet. App. 81a. In light of the inefficacy of that approach during the relevant time period, the agency was required to devise an alternative methodology for identifying those eggs that were linked to salmonella, namely, by testing hens. The consequences of human consumption of salmonella-contami-

In concluding that the "reasonable investment-backed expectations" factor favored petitioner, the court of appeals stated that the salmonella regulations intruded on legitimate reliance interests because "[t]hey were grounded in new scientific understanding (i.e., that salmonella could be transmitted from hen to egg) and were unprecedented in their reliance on environmental and hen testing." Pet. App. 74a-75a. That discussion reflects a fundamental misunderstanding of the significance for Just Compensation Clause analysis of a takings plaintiff's reasonable investment-backed expectations.

In assessing regulatory takings claims, this Court has recognized that "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Connolly*, 475 U.S. at 227 (quoting *FHA* v. *Darlington, Inc.*, 358 U.S. 84, 91 (1958)); see *Concrete Pipe*, 508 U.S. at 645. Thus, for purposes of *Penn Central* analysis, a property owner ordinarily has no reasonable expectation of being allowed to continue an ongoing activity in the face of new evidence that the

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nated eggs are severe enough, moreover, that the government could properly ban (or restrict) the interstate transportation of categories of eggs that were found to pose a heightened danger, even though there may have been a relatively small probability that any particular egg within the category was contaminated. In addition, even small numbers of salmonella-contaminated eggs can pose particularly great risks, because, when numerous eggs are pooled together for preparation of a recipe (as in a restaurant setting), "[a] single infected egg can contaminate the whole pool." C.A. App. 210. Thus, while the pertinent USDA regulations had the effect of preventing petitioner from marketing as table eggs millions of uncontaminated eggs, that restriction was an unavoidable consequence of the agency's reasonable efforts to address the health risks posed by the eggs produced by petitioner that *were* contaminated. See Pet. App. 78a-81a.

conduct will cause significant public harm. Rather, the owner may fairly be charged with knowledge that existing regulatory safeguards can be strengthened or expanded in light of new information concerning the likely effect upon the public welfare of particular private conduct.

That approach to the assessment of reasonable investment-backed expectations is fully consistent with the overriding purpose of the Just Compensation Clause, which is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). A property owner who is forced to cease or modify commercial activity that poses a serious risk to public health cannot claim to have been unfairly singled out simply because the relevant activity may once have been viewed as posing less of a risk. The unreasonableness of any such expectation is particularly apparent where, as here, the restriction that is claimed to effect a taking merely supplements an established regulatory scheme that has long served to prevent the same basic type of harm at which the new restriction is directed. To treat such modifications as interfering with reasonable investment-backed expectations would substantially hinder the efforts of federal and state governments to protect the public health and safety by revising their regulatory programs to take account of new scientific information.

Thus, even if the specific danger (hen-to-egg transmission of salmonella) at which the 1990 USDA regulations were directed had truly been unforeseeable at an earlier time, the government would not have interfered with petitioner's reasonable investment-backed expectations by adapting its enforcement scheme in response to a "new scientific understanding" (Pet. App. 75a) that

such a risk existed.[8] The court of appeals' assertion (*ibid.*) that the salmonella regulations "were unprecedented in their reliance on environmental and hen testing" is even further beside the point. So long as the testing methodology used by the agency was an otherwise reasonable means of determining whether petitioner's eggs were safe for human consumption as table eggs—and both the Seventh and Federal Circuits concluded that it was, see pp. 4-8 & n.7, *supra*; Pet. App. 81a—petitioner had no legitimate reliance interest in resisting restrictions based on its use, regardless of whether that testing methodology differed substantially or only incrementally from prior testing regimes.

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[8] In fact, neither USDA's conclusion that salmonella in eggs posed a serious risk to human health, nor the testing program mandated by the 1990 regulations, reflected a dramatic departure from prior understandings. "In the late 1980's, the [CDC] determined there was a growing problem with [salmonella] in chicken eggs." Pet. App. 125a. In August 1988, USDA stated that the salmonella "problem [had] become a serious human health issue." C.A. App. 197, 199. A scholarly paper published in 1988 discussed the scientific evidence suggesting transmission of salmonella from hen to egg, and it explained that "[l]ong-term control of [salmonella] infections will require study of the ecology of the organism in poultry flocks." Michael E. St. Louis et al., *The Emergence of Grade A Eggs as a Major Source of Salmonella enteritidis Infections*, 259 JAMA 2103, 2106 (1988) (C.A. App. 248). Petitioner, a major participant in the national egg market, should surely have been aware of those developments. Indeed, the first restrictions were not placed on the interstate sale of eggs from petitioners' farms until October 5, 1990, almost eight months *after* the interim regulations were published on February 16, 1990. See Pet. App. 5a, 7a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2009

SUPREME COURT U.S.
JAN 20 2010

No. 08-1520

In The Supreme Court of the United States

CITY OF DALLAS, TEXAS, *Petitioner*,
v.
ROWAN W. GOULD, DIRECTOR OF THE UNITED STATES FISH AND WILDLIFE SERVICE, *ET AL.*, *Respondents*.

On Petition For A Writ Of Certiorari To The United State Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION

Pursuant to Supreme Court Rule 15.6, Petitioner City of Dallas files this Reply to address the new points raised in Respondent Fish and Wildlife Service's ("FWS")[1] Opposition Brief.

INTRODUCTION

In this case, long-planned public water supplies were given short shrift to make way for a wildlife refuge. The decision below would deprive 1.8 million people of a public water supply without so much as an inquiry into the impact or even the slightest analysis of a municipality's ability to secure other water sources. FWS claims, without substantive explanation, that projecting beyond 20 years would be "speculative" even though state law *requires* assessment and planning for longer than that duration and the very impacts at issue here were assessed in the state process. FWS did not (i) consider the detailed information on environmental impacts or (ii) foster informed public participation, in derogation of NEPA's fundamental purposes. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004) (citation omitted).

FWS contends the Fifth Circuit's decision is defensible because it was "fact-based," but offers no principled basis on which to distinguish this case from other cases decided by this Court and other circuit courts. Because NEPA applies to *all* federal

[1] Respondents (Pet. at ii) are referred to collectively as FWS.

agencies and because the Fifth Circuit's decision conflicts with decisions of this Court and other circuit courts such that NEPA law is no longer uniform, this Court should grant the petition. *Thompson v. Keohane*, 516 U.S. 99, 106 (1995).

ARGUMENT

A. The Fifth Circuit's Approval Of FWS's Reliance On Outdated Information Conflicts With Ninth Circuit Decisions.

1. FWS misrepresents the data it used.

That NEPA requires agencies to use high quality data in EAs is beyond dispute. *See* Pet. at 29-30. Here, the EA's text and data on bottomland hardwoods (protection of which was a primary purpose of the refuge), wildlife, vegetation, environmental impacts, and socioeconomic conditions were all lifted, much of it *word-for-word*, from a 20-year-old draft EA which relied on even older data. *Compare* Pet. at 9, 30, 32, App. 12a-13a, 49a *with* Opp. at 15. The EA does not *mention* the vaunted "examination of the site in 2004" upon which FWS now relies. Opp. at 15. The record reflects no evidence that FWS relied on this 2004 visit or any other recent information in its decisionmaking.[2] Nor does the EA account for the fundamental fact that bottomland hardwoods landcover—the feature this refuge supposedly seeks

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[2] *See* USCA5 2770 (FWS had not visited most of site within 10 years before EA's preparation), AR554 (to extent FWS did visit portion of acreage, it noted significant logging over last 20 years).

to protect—*had dwindled from 71 percent to 31 percent* within the proposed refuge. App. 50a.

An agency cannot simply declare that its information is "sufficient." Opp. at 15. The record must actually reflect a "hard look." *See, e.g.*, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *New Mexico v. Bureau of Land Mgmt.*, 565 F.3d 683, 707 (10th Cir. 2009); *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 781 (10th Cir. 2006). FWS admits that agencies must be "*fully informed* with respect to the environmental consequences of their proposed projects." Opp. at 3 (emphasis added). FWS was not "fully informed" here. It approved the refuge without knowing what it was protecting or the full environmental consequences of its actions. Had FWS recently analyzed the refuge area, it would have learned of the degradation of the resources it sought to protect. If FWS decisionmakers had considered the loss of habitat, they likely would have recognized that other nearby areas were better suited for a refuge.[3] And, this location would have allowed for the City's planned reservoir. Pet. at 32 (citing App. 12a, 47a, 50a).

2. The Fifth Circuit's approval of FWS's reliance on outdated information conflicts with Ninth Circuit decisions.

The Fifth Circuit's decision approving FWS's actions directly conflicts with Ninth Circuit case law. Pet. at 31-32 & n.14. FWS claims there is no conflict

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[3] The City's own study (that FWS never considered) concluded that other areas were superior to the depleted section designated by FWS. App. 9a, 46a-47a.

because the cases cited by the City involve EISs or "procedural situations not presented here." Opp. at 16. Other than this empty declaration, FWS makes no attempt to distinguish two cases in the City's petition: *Lands Council v. Powell*, 395 F.3d 1019 (9th Cir. 2005) and *Klamath-Siskiyou Wildlands Center v. U.S. Forest Service*, 373 F. Supp. 2d 1069 (E.D. Cal. 2004).[4]

The conflict with *Lands Council* is particularly stark. There, environmental groups challenged the Forest Service's reliance upon 13-year-old fish habitat data in its EIS. The Ninth Circuit found that "any degradation or improvement in the last thirteen years" in fish habitat conditions was relevant to the agency's analysis. 395 F.3d at 1031. While the data relied upon by an agency need not be "immediate," the "lack of up-to-date evidence" on important environmental consequences prevents an agency from making accurate impact assessments. *Id.* The Ninth Circuit rejected the agency's reliance on this "stale" data. *Id.* Plainly, application of the Ninth Circuit's jurisprudence would have required FWS to update its environmental information (particularly on the bottomland hardwoods it sought to protect).

In *Klamath-Siskiyou*, the district court applied this high quality data standard *in an EA*. The district court found that the Forest Service's conclusions should not be based on "incomplete and outdated information" because that would render "the overall conclusions uncertain." *Klamath-Siskiyou*, 373 F. Supp. 2d at 1081. Without recent,

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[4] Westlaw indicates the Fifth Circuit's decision criticizes *Lands Council* and distinguishes *Klamath-Siskiyou*.

thorough surveys of certain geographical areas within the project area, the court found the agency did not know or understand its project's actual effects (in that case the presence of owls and their habitat). *Id.* The court concluded that the agency's ten-year-old information likely "dramatically misrepresents" the environmental impacts, rendering the agency unable to support its fundamental conclusions about the significance of the project's effects. *Id.* at 1081, 1083. In this case, the City's subsequent studies actually *demonstrate* that data in the EA "misrepresent" environmental conditions.

FWS goes so far as to suggest that NEPA allows agencies to use unreliable, antiquated data in EAs, but not EISs. Opp. at 15-16. That assertion is belied not only by the Ninth Circuit's jurisprudence, but by the CEQ's regulations, 40 C.F.R. §§ 1500.1(b), 1502.24, and an EA's fundamental purpose, *id.* § 1508.9(a)(1). *See* Pet. at 29-30. Nor could it meet NEPA's "hard look" standard. Under the EA standard advocated by FWS and approved by the Fifth Circuit, an agency need only a dim understanding of the current conditions on the very ground of its proposed action. Ignoring recent data essential to the purpose of an agency's proposed action is not a harmless departure from NEPA's mandatory requirements—it "greatly degrade[s]" NEPA's twin purposes. *New Mexico*, 565 F.3d at 708. If the Fifth Circuit's opinion is not corrected, it will provide legal cover for other federal agencies to ignore NEPA's data and scientific integrity requirements, and rely upon outdated information and assumptions in an EA or even an EIS.

B. The Fifth Circuit's Approval Of FWS's Refusal To Examine Suggested Alternatives Conflicts With Other Circuits.

1. FWS mischaracterizes the refuge's purpose and need.

As the petition explains (at 20), both FWS and the Fifth Circuit misstated the articulated purpose and need statement in FWS's EA, which in turn changed the legal analysis. Opp. at 13-14 ("preserving the Upper Neches habitat was the very purpose of the contemplated [agency] action"); App. 9a. This inaccuracy permeates FWS's Opposition and the Fifth Circuit's decision. FWS's FONSI and EA defined three broad purposes, protecting (i) migrating bird habitats, (ii) bottomland hardwoods, and (iii) compatible recreation opportunities.[5] These NEPA documents *never* geographically limited the refuge to the *Upper* Neches. And nothing in this purpose statement would prevent the reservoir and refuge from coexisting.

2. The City proposed a joint refuge/reservoir alternative.

Contrary to FWS's assertions (Opp. at 14, n.5), the City's comments on the EA explicitly recommended a joint refuge/reservoir alternative. USCA5 3644 (City requested "working together to develop a mutually beneficial proposal that incorporates both the Wildlife Refuge and Lake

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[5] *See* USCA5 2786-87 (EA), 3851-52 (FONSI).

Fastrill Reservoir").[6] FWS never performed even a cursory analysis of this alternative. The City subsequently identified an environmentally superior location that it believed would allow a refuge/reservoir alternative. FWS should have considered this alternative. *NRDC v. Evans*, 168 F. Supp. 2d 1149, 1160 (N.D. Cal. 2001) (EA alternatives inadequate because agency failed to address commenters' proposed alternatives, did not adequately explain that failure, and did not offer its own appropriate alternatives), *vacated in part on other grounds*, 316 F.3d 904 (9th Cir. 2003).

3. FWS was required to propose and study alternatives.

FWS—not the City—has the primary and nondelegable responsibility to propose alternative refuge locations.[7] NEPA requires *federal agencies* to "study, *develop*, and describe the appropriate alternatives to [the] recommended course[] of action in any proposal which involves *unresolved conflicts* concerning alternative uses of available *resources*." 42 U.S.C. § 4332(2)(E) (emphasis added); 40 C.F.R. § 1507.2(d); *New York v. Dep't of Transp.*, 715 F.2d 732, 742 (2d Cir. 1983) (42 U.S.C. § 4332(2)(E) applies to fresh water). That the City went so far as to prepare a subsequent study of available

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[6] Other commenters also discussed a feasible refuge/reservoir combination. *See* USCA5 2828-29, 2832-34, 4209-12.

[7] *Compare* Opp. at 14 n.5 *with Suffolk v. Sec'y of Interior*, 562 F.2d 1368, 1385 (2d Cir. 1977) and *Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975).

alternatives does not shift the responsibility for developing alternatives from FWS to the City.

4. The Fifth Circuit's decision on the alternatives conflicts with other circuits.

FWS's attempt to avoid precedent in the Second, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits depends on distorting the purpose and need for its proposed refuge. Case law in these jurisdictions holds that (i) alternatives fulfilling an EA's purpose and need are *per se* reasonable, (ii) alternatives cannot be limited to one geographical area if the agency's purpose and need statement is not similarly confined, and (iii) adoption of two nearly identical alternatives fails NEPA's "hard look" requirement. Pet. at 19-21. The City's proposed joint refuge/reservoir alternative would not have conflicted with the refuge's *stated purpose* and should have been included in FWS's range of alternatives. Pet. at 18, 22.

Furthermore, the cases the City cites are not factually distinguishable. Opp. at 14.[8] *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002) provides just one obvious example of a circuit conflict. There, the Tenth Circuit considered an agency's duty to discuss and evaluate appropriate alternatives in a "properly-drafted EA." *Id.* at 1120 (in an EA, agency must consider more than simply the proposed project and a no action approach). In *Davis*, the agency rejected various alternatives—including the combination of two or more options that cumulatively met the

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[8] The City does not agree that EIS cases discussing the alternatives analysis are inapplicable. Pet. at 19.

project's purpose and need—claiming they were too remote or speculative to be considered. *Id.* at 1121-22. The court held that the EA's detailed analysis of only two alternatives was arbitrary and capricious because the agency dismissed viable alternatives "in a conclusory and perfunctory manner." *Id.* at 1122; *see also Sabine River Auth. v. U.S. Dep't of Interior*, 745 F. Supp. 388, 399 (E.D. Tex. 1990) (FWS's EA considered a joint refuge/reservoir alternative, even though the planning for that reservoir was far more speculative and conducted before Texas adopted its current, more rigorous statutory water planning regime). Based on *Davis*, were the Tenth Circuit to decide this case, it would have required FWS to consider the City's proposal for a joint refuge/reservoir project.

C. The Fifth Circuit And FWS Misapply This Court's Precedent On Proximate Cause.

The refuge designation permanently[9] alters the range of water supply options available to the City, foreclosing the only reservoir the City had planned over the next 50 years and completely eliminating the most suitable site. Yet, the Fifth Circuit's interpretation of proximate cause excused FWS's decision to ignore the City's loss of a water supply source.

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[9] FWS asserts its refuge is permanent because only an act of Congress could divest the federal government of land once it is part of a refuge. USCA5 2803, 2812, 3855; App. 65a.

1. The Fifth Circuit and FWS omit an essential element of *Public Citizen* in their analyses.

In *Public Citizen*, this Court instructed that "courts must look to the *underlying policies or legislative intent* in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not." *Public Citizen*, 541 U.S. at 767 (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)) (emphasis added). The analysis is not, as FWS suggests, merely limited to drawing a "manageable" line. Instead, a reviewing court must draw the line between impacts included in the analysis and impacts deemed too remote or speculative to be included based upon NEPA's underlying policies. FWS drew its line too narrowly, excluding water supply impacts caused by the elimination of Fastrill Reservoir from a very limited array of potential water reservoir locations available to the City. In so doing, FWS failed to fulfill NEPA's underlying purposes: ensuring (i) agencies are fully informed of the environmental consequences of their actions, and (ii) the public is involved in the decisionmaking process. *Id.* at 768.

The Fifth Circuit endorsed FWS's claim that the impacts of its planned refuge on the City's future water supplies were too speculative to be considered. As evidence of that "speculativeness," the Fifth Circuit claims that the City and TWDB had neither taken any concrete steps toward constructing the reservoir nor "settled upon the exact position of the dam or footprint of the reservoir." App. 11a. FWS knew about the City's ongoing feasibility study and

subsequent study researching a joint refuge/reservoir combination. Nonetheless, FWS pushed ahead, issuing a FONSI on the basis of a draft EA. FWS claimed the reservoir was speculative and never considered the refuge's impacts on the City's long-term water supply. The Fifth Circuit endorsed this "know-nothing" approach, making no attempt to explain how this decision complied with NEPA.

The Fifth Circuit and FWS never justified their determinations that impacts on future water supplies are "speculative" under NEPA. FWS's decision to permanently preserve land along the Upper Neches disregarded both fundamental policies underlying NEPA. First, FWS did not analyze the serious long-term risks to public health caused by its interference with state and local water planning. Second, FWS deprived the public of the opportunity to weigh the merits of two distinct public benefits, and the ability to evaluate their impacts on local water supply. Put simply, FWS's decision on what was "speculative" excluded from consideration a major environmental impact, thereby thwarting the two purposes of NEPA.

2. The Fifth Circuit's decision conflicts with the Ninth Circuit's interpretation of speculativeness.

The Fifth Circuit claimed that the water supply impacts caused by FWS's decision to permanently preserve land were properly excluded from NEPA review because of the "uncertainty over whether the reservoir will be constructed and its impact on water supplies, and the long time frame for the project." App. 11a. The Fifth Circuit suggests that a

"concrete step" such as a permit is a key element in determining whether an impact—or the risk of an impact—is sufficiently related to a project to merit consideration in a NEPA document.

This approach stands in stark contrast to the Ninth Circuit's decision in *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, 449 F.3d 1016, 1029-30 (9th Cir. 2006). There, the Ninth Circuit held that it was unreasonable for the Nuclear Regulatory Commission ("NRC") to dismiss categorically the possibility of a terrorist attack on a nuclear waste storage facility as too remote or speculative for NEPA review. The Ninth Circuit noted that this Court, in *Metropolitan Edison*, explicitly did not address a situation, such as that presented in *Mothers for Peace*, in which "an agency is asked to consider effects that will occur if a risk is realized." *Metropolitan Edison*, 460 U.S. at 775 n.9. The Ninth Circuit held that the NRC failed to address comments that the proposed action would increase the risk of a terrorist attack on the site.

This case also concerns the impacts of a realized risk: the risk that Fastrill Reservoir would never be built. The City asked FWS to evaluate the water supply impacts of its decision to thwart the only reservoir planned for the next 50 years. If the refuge were not designated, the record suggests that there is at least as much likelihood that the City would construct Fastrill Reservoir as there is that terrorists would successfully attack a particular nuclear waste storage site. Indeed, the record reflects that the City is required by law to make long-range water plans, that the reservoir was always part of that planning, that the City was undertaking a feasibility study, and that the City

directly expressed its intent by requesting FWS to delay its action or find a way to accommodate both land use goals. Pet. at 3-5; TWDB Pet. at 7-10, 18-20, 24-27. The Ninth Circuit, applying these facts to this Court's NEPA proximate cause jurisprudence, would have required FWS to consider these water supply impacts.

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the City's petition should be granted.

Respectfully submitted.

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